88-699

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEAL

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QUESTIONS PRESENTED

1. Whether an International Union may be held vicariously liable under Title VII, 42 U.S.C. § 2000e *et seq.*, for the acts of an affiliated autonomous Local Union where the International Union has adopted a nationwide affirmative action training program funded by and at the request of the United States Department of Labor, and where the Local Union's administration of the program results in a disparate impact even though the International Union had no notice of the alleged improper action of its autonomous affiliated Local Union and was given no opportunity to take remedial action.

2. Whether an International Union can be burdened with vicarious liability because it made lawful suggestions to an autonomous affiliated Local Union that the Local Union should take aggressive affirmative steps to bring into the work force and into the membership of the Union minorities, under circumstances which would require the International Union to impose a trusteeship on an autonomous Local Union in violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 401 *et seq.*, if those suggestions are not followed.

3. Where, pursuant to the policies of *United Mineworkers v. Gibbs*, 383 U.S. 715 (1969) and Title VII, 42 U.S.C. § 2000e *et seq.*, an International Union attempts to advise Local Unions how to comply with the requirements of Title VII, 42 U.S.C. § 2000e *et seq.*, may the International Union be held vicariously liable for a Local Union's failure to take sufficient action to remedy a situation causing a disparate impact.

LIST OF PARTIES TO THE PROCEEDINGS

The following persons or entities are the parties to the proceeding below and their party designation is listed.[1]

Jesse Berger (Plaintiff)

Randolph Jackson (Plaintiff)

Tommy Kirkland (Plaintiff)

Van Edward Louis (Plaintiff)

Ronald Tucker (Plaintiff)

Ernest Bellamy (Plaintiff)

Garrick Simmons (Plaintiff)

Willie Lee McMillan (Plaintiff)

Iron Workers Reinforced Rodmen, Local 201 (Defendant)

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Defendant)

Construction Contractors Council, AGC Labor Division, Inc. (Defendant)

Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 (Defendant)

Local Administrative Committee of the National Iron Workers and Employers Training Program (Defendant)

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[1] Petitioner believes that the Construction Contractors Council, AGC Labor Division, Inc., the Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 and the Local Administrative Committee of the National Iron Workers and Employers Training Program no longer have an interest in this litigation, since the D.C. Circuit reversed the District Court's findings of liability against these entities.

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JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEAL

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, respectfuliy prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 5, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit holding the International Union vicariously liable for the actions of its affiliated Local Union No. 201 is reported at 843 F.2d

1395 (D.C. Cir. 1988) and is printed at Appendix 1a in the Joint Appendix.[2] The Court of Appeals for the District of Columbia Circuit slip opinion dated July 29, 1988 is printed at Appendix 88a in the Joint Appendix. The Trial Findings of the United States District Court for the District of Columbia is unreported and is reprinted at Appendix 92a in the Joint Appendix. The District Court's amended order is unreported and is reprinted at Appendix 156a in the Joint Appendix. The Court of Appeals' April 5, 1988 judgment is reprinted at Appendix 174a in the Joint Appendix. The orders of the Court of Appeals dated July 29, 1988 regarding the petitions for rehearing and the suggestion for rehearing *en banc* are reprinted at Appendices 178a & 180a in the Joint Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 5, 1988. A petition for rehearing and suggestion for rehearing *en banc* was filed on May 11, 1988.

The Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc* on July 29, 1988. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely filed with this Court pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant federal statutes involved are 42 U.S.C. § 1981 and 42 U.S.C. §§ 2000e-2 and 2000e-5 which are reprinted in pertinent part at Appendix 1a to this Petition.

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[2] The Joint Appendix is submitted by the International Association, Petitioner herein, and by Reinforced Rodmen's Local Union 201 with respect to its separate Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves a class action brought by eight black construction workers alleging racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Petitioner, International Association of Bridge, Structural and Ornamental Ironworkers, is an International Union within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.* Rodmen's Union Local 201 is a Local Union in the Washington, D.C. area and is affiliated with the International Association.

The complaint charged that various requirements for admission into Local 201 discriminatorily denied black rodmen the benefits of union membership. Suit was filed in 1975, and the case was tried in 1981. Almost four years later, in 1985, the District Court issued its Trial Findings. The District Court adopted almost verbatim the proposed Findings of Fact and Conclusions of Law submitted by the plaintiffs, including typographical errors. As found by the Court of Appeals, the District Court failed to perform any independent reasoning, failed to address the defendants' leading arguments, and the Trial Findings contained a number of "clearly erroneous factual findings and several errors of law." In the words of the D.C. Circuit, "[n]ot surprisingly, the District Court found all of the defendants liable for all of the alleged violations of Title VII and Section 1981." (See *Berger*, 843 F.2d at 1404, 1407-08).

Specifically, the District Court found the International Association vicariously liable under Title VII and 42 U.S.C. § 1981 for the actions of Local 201 and, in addition, found the International liable for retaliation against Plaintiff Bellamy. On appeal, the latter finding was reversed by the D.C. Circuit; however, the D.C. Circuit affirmed the finding of vicarious liability for the actions of Local 201.

The case was tried solely on statistics on a disparate impact theory. There was no evidence of disparate treatment involved. The Court of Appeals found that the Local Union's requirement that persons complete a training program prior to being able to sit for the journeyman examination had a disparate impact upon blacks. The Court of Appeals succinctly stated, with emphasis, the conduct found to be violative of Title VII and § 1981:

> *An educational prerequisite—either apprenticeship or training—discriminatorily delayed Union membership for qualified black permit workers.* (emphasis in the original) (*Berger*, 843 F.2d at 1414)

With respect to the International Union, the Court of Appeals recognized that the International Constitution does not "require or authorize Locals to require, applicants for membership to complete a Union-supervised educational program." Rather, under the International Constitution one need only be "a practical workman versed in the duties of some branch of the trade . . . of good moral character and competent to demand standard wages." (*Berger*, 843 F.2d at 1431).

Additionally, there was no evidence that the International knew that a disparate impact was occurring at Local 201. In fact, the International had reason to believe that no discrimination was occurring in the Local Union by virtue of the Federal Government's exclusion of Local 201 from a federally-mandated affirmative action plan because, as the government found, Local 201 had a significant percentage of minority participation. Nevertheless, the Court "inferred" knowledge on the part of the International and, on that basis, imposed vicarious liability upon the International Union.

The International Union now seeks a Writ of Certiorari to review this imposition of vicarious liability.

REASONS WHY THE WRIT SHOULD ISSUE

1. This case presents a serious policy dilemma for International Unions throughout the United States relating to civil right's issues. In this case, the Court is faced with an International Union which took very seriously the moral and legal mandates of the civil right's statutes enacted in the 1960s, and took affirmative action to implement this legislation and facilitate the entry of minorities into the ranks of the Ironworkers' Unions throughout the United States. The Training Program challenged in this case was established by the International Union on a nation-wide basis *at the request of the Federal Government*, and was designed to assist blacks and other minorities to become proficient in the ironworkers' trade. The decision in this case, imposing vicarious liability upon the International Union for the acts of an affiliate in the administration of the program, sends a message to International Unions across the country not to become involved in affirmative actions plans, since to do so could result in their being held vicariously liable for the acts of their affiliated Local Unions, despite the fact that the International may have no knowledge that a problem exists. This decision therefore hinders rather than advances the purposes for which the civil rights legislation was enacted.

2. If there is one constant principle enunciated by this Court for more than half a century, it is that International Unions will not be held liable for the acts of an affiliate unless it can be shown that the International authorized, ratified or participated in the Local Union's actions or otherwise controls the Local Union. (*Coronado Coal Co. v. United Mineworkers*, 268 U.S. 295 (1925); *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1979)) By imposing vicarious liability upon the International Union, the Court's decision is directly contrary to the principles enunciated by this Court, and the lower federal courts, as to when an International Union will

be held vicariously liable for the actions of affiliated Local Unions.

3. Since all of the actions complained of on the part of the International were designed to bring the Ironworkers' Local Unions throughout the United States into compliance with the civil rights legislation, the holding below imposing vicarious liability upon the International Union is directly contrary to the principle enunciated by the Fifth Circuit in *Terrell v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981), where the Fifth Circuit noted that whether a party involved in an established Title VII violation may be excused from liability turns upon whether that party has proven that it has taken every reasonable step to bring employment practices into compliance with the law. Additionally, the decision conflicts with the Congressional policy of strengthening Local Union autonomy and self-government embodied in the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401 *et seq.*).

4. The Court's decision below conflicts with the national labor policy which encourages International Unions to use their mediating influences to bring Local Unions into compliance with law (*United Mineworkers v. Gibbs*, 383 U.S. 715 (1969)) and, instead, encourages International Unions not to become involved in Local Union problems for fear of incurring vicarious liability for the actions of the Local Union.

ARGUMENT

A. The Court's Decision Imposing Vicarious Liability Upon The International Union Conflicts With *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1971) And Its Progeny.

The opinion below cites no evidence that the International Union authorized, condoned or ratified the challenged conduct. Rather, the decision simply states that it is "reasonable to infer" an agency relationship and to "infer" International knowledge. As such, the imposition of vicarious liability upon the International Union is contrary to *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1971) and its progeny. A brief review of the facts is necessary to demonstrate the chilling effect which the decision below will have upon International Unions nation-wide.

With respect to the Apprenticeship Program, the International Union sent apprenticeship questionnaires and guidelines to all of the Local Unions in the United States affiliated with the International, including Local 201. These questionnaires and guidelines were recommendations as to what the Local Unions should do in order to be in compliance with Federal Regulation 29 CFR, Part 30. (Int'l. Ex. 6). The International Union did not approve standards of apprenticeship for Local 201 or for any other Local Union since the International does not have that authority. Rather, approval of the apprenticeship standards is within the authority of the Bureau of Apprenticeship and Training of the Department of Labor. (*Id.*).

The Training Program was instituted in 1972 and was established under a CETA contract with the Department of Labor to provide membership opportunities to minorities over age 30 who were no longer eligible for the Apprenticeship Program. (T.R. 1481). At the request of the Federal Government, a national corporation known as the

National Ironworkers and Employers Training Program (not the International Union) was formed. (Int'l. Ex. 6). The national corporation signed a contract with the Federal Government, and it was then a voluntary decision on the Local Union's part as to whether or not it wished to participate. (*Id.*; Pls. Ex. 105, pp. 11-13). If the Local Union decided to participate in the Training Program, the Local Union signed a contract with the national corporation and the national corporation put the program into effect. (Int'l. Ex. 6) The Local Committee, which consists of three labor representatives from the Local Union and three management representatives from local employers, selected a director, selected the instructors, and selected the trainees. (*Id.*). The national corporation, with federal funds obtained through the GSA, supplied the school space, the tools and equipment. (*Id*). Any complaints concerning the Training Program were directed to the national corporation, not to the International Union. (*Id.*). The program was funded by the Department of Labor, and was primarily oriented toward training members of minority groups. (Rodmen Ex. 29 (C), pp. 1-2; T.R. 1333, 1512, 1563, 2876).

The Department of Labor contract prescribed objectives and standards for operation of the program. (Rodmen Ex. A-E)). A representative of the Department of Labor participated as a non-voting member of the Local Administrative Committee, and attended committee meetings. (Rodmen Ex. 29(C), p. 4; Rodmen Ex. 34 (A-J); T.R. 1354). The Department of Labor's representative was charged with the responsibility of monitoring the Local Administrative Committee's performance. (Rodmen Ex. 29(C), p. 19). The local Department of Labor representative frequently observed classes as well as attending committee meetings and, in addition, the Department of Labor has sent in a team to monitor the program and to interview students. (T.R. 1347-48).

It was undisputed that the International Union had no appointing authority to either the Apprenticeship Committee or the Training Program Committee on the local level, and was not involved in any way in the day-to-day administration of either program. Nevertheless, the court found the International vicariously liable for the actions of the Local Union because the International, in 1971, required the Local Union to administer the journeyman exam to all persons with two years' experience. This period was referred to as the "open period." However, the evidence demonstrated that the majority of persons who took the exam during the "open period" failed the examination. Thus, a year later, in 1972, the Training Program was established *at the request of the Federal Government* and in conjunction with the U.S. Department of Labor to provide a remedial program through which blacks and other minorities could gain the training necessary to earn a living in the Ironworkers' trade.

By imposing vicarious liability upon the International Union because of its participation in the establishment of the Apprenticeship Program and the Training Program, both of which were completely lawful on their face, and without any evidence of the International's involvement in their implementation or administration on the local level, the court's decision is directly contrary to the principles enunciated by this Court, and the lower federal courts, as to when an International Union will be held vicariously liable for the actions of affiliated Local Unions. In *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217-18 (1979), this Court held that an International Union will be held liable for the actions of its affiliates *only* if it authorizes, ratifies or participates in particular Local Union acts or otherwise controls the Local. See also, *Coronado Coal Company v. United Mine Workers*, 268 U.S. 295, 304-305 (1925); *NLRB v. International Longshoremens' and Warehouse-*

men's Union Local 10, 283 F.2d 558 (9th Cir. 1960). It is firmly established law that when two legal entities are separate, independent and self-governing autonomous bodies, one may not be held responsible for the acts of the other. *Coronado Coal Company, supra*, 268 U.S. 295, 299 (1925); *United Mineworkers v. Coronado Coal Company*, 259 U.S. 344, 393 (1922).

In the context of Title VII, the law is the same. In *Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), the Fifth Circuit noted that an International Union, although its constitution gives it significant control over its affiliated Local Unions, is not automatically liable for the actions of its affiliates in violation of Title VII.

> As a general proposition, however, International labor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII and the Equal Pay Act. . . *But that duty is not absolute under all circumstances.* In a situation such as now before the Court, it is based on the relationship between the International and the local and the amount and type of involvement which the International has with the collective bargaining agreement. . . . *Sinyard*, 577 F.2d at 945 (emphasis added).

In *Sinyard*, the International Union was not found liable for the Title VII and Equal Pay Act violations committed by its affiliated Local Union, despite the constitutional provisions giving it the right to control and approve the collective bargaining process, because the International did not participate in the collective bargaining process nor sign the collective bargaining agreement.[3] See also, *Boss v. International Brotherhood of Boilermakers*, 567 F.Supp. 845 (N.D.N.Y.), *aff'd without opinion*, 742 F.2d 1446 (2nd Cir. 1983), *cert. den.*,

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[3] The constitutional provisions in *Sinyard* were virtually identical to the constitutional provisions in the instant case.

105 S. Ct. 89 (1984) (International Union not liable for the Local Union's discriminatory operation of the hiring hall, despite the fact that the International was the *sole signatory* to the collective bargaining agreement, because there was no evidence that the International ratified, authorized or condoned the activities of the Local Union.)

With respect to the very constitution at issue in this case, the courts have likewise recognized that the constitutional provisions alone are inadequate to impose liability upon the International Association of Iron Workers. One Appellate Court has specifically rejected the proposition that this International is liable for the actions of a Local Union, even in negotiating collective bargaining agreements. See, *Crouch v. Mo-Can Ironworkers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984). Recently, a District Court, after exhaustively reviewing the provisions of the constitution at issue in this case, also expressly rejected the proposition that the constitution makes the International Association of Ironworkers per se liable for the acts of its affiliates, even where *the International itself* is signatory to the collective bargaining agreement. (See, *Hamilton v. International Bridge, Structural and Ornamental Ironworkers*, 122 L.R.R.M. 3309 (W.D. Ky. 1986)).

There was simply no evidence whatsoever in this case which showed that the International Union authorized, condoned or ratified the challenged conduct of requiring minority workers to participate in either the Apprenticeship Program or the Training Program prior to being able to sit for the examination. In fact, the only concrete evidence with respect to this issue demonstrated that the International Constitution neither required nor authorized Local Unions to require such an educational prerequisite, and demonstrated that each program was a voluntary program undertaken by the Local Unions and administered solely on the Local Union level. The

Court's decision rests upon the tenuous basis that it was "reasonable to infer" an agency relationship between the International and Local 201 and "reasonable to infer" that the International knew of the discriminatory impact occurring in Local 201. As will be discussed *infra*, this is not a "reasonable" inference in view of the Federal Government's decision to *exclude* Local 201 from the "Washington Plan", a federally-mandated affirmative action plan to correct discrimination in the Washington, D.C. area. Certainly *Carbon Fuel* and its progeny demand more than was present in this case before vicarious liability may be imposed upon an International Union.

B. The Court's Decision Is In Conflict With The National Labor Policy Which Favors The Exercise By International Unions Of Their Mediating Influences.

A review of the remaining evidence as to the International Union's actions which formed the basis for holding it vicariously liable is an exercise in irony, since by each of its actions, the International was attempting to help facilitate compliance with the civil rights laws.

In approximately 1963, the General President of the International Union assigned a representative to coordinate matters relative to civil rights in an endeavor to assist all Local Unions to come into compliance and stay in compliance with federal civil rights regulations. (Int'l. Ex. 6). The International subscribed to BNA and to Fair Employment Practices Reports and to numerous other sources all relative to civil rights problems which were read and, if something reported affected the Local Unions, the information was communicated to the Local Unions. (*Id.*). International representatives met with Local Unions and suggested appropriate form letters and discussed at length the reasons why standard procedures for acceptance of non-members should be adopted as well as why non-members should be admitted. The International intervened to prevent future Title VII litigation. The International sent organizers to meetings all over the

country informing the Locals to give persons working on permits tests to become members of the Association, and appointed a committee to visit every outside Local Union in the United States to explain what was required by Title VII, and to make recommendations to Local Unions to bring them into compliance with Title VII.

What the Court was confronted with in this case was an International Union which, rather than turning a blind eye to discrimination problems, took an active part in attempting to eradicate racial discrimination within the ranks of the Ironworkers unions. Thus, the decision in this case conflicts with this Court's enunciation of the federal labor policy in *United Mine Workers v. Gibbs*, 383 U.S. 715, 738-39 (1969).

In *Gibbs*, this Court stated that the national labor policy encourages International Unions to conduct normal supervisory functions even in explosive situations. In order that parent organizations would not be "chilled" in exercising their restraining and mediating influences, this Court recognized that "it would be inconsistent with the fabric of national labor policy to infer ratification" of a Local Union's activities from the mediating efforts of its International. (*Id.* at 738). This Court further recognized that this beneficial and salutary International presence would be unlikely if the parent union were required to repudiate or disavow the acts of its locals.

The Sixth Circuit has also warned that the imposition of vicarious liability upon Unions could mean the end of the Labor Movement as we know it:

> Such vicarious liability is repugnant to due process of law. And this Circuit has repeatedly recognized that unions may only be held responsible for the authorized or ratified acts of its officers and agents. *North American Coal Corp. v. Local 2262, United Mine Workers*, 497 F.2d 459, 466-67 (6th Cir. 1974)

Indeed, the D.C. Circuit itself has noted that where an International Union exercises its supervisory powers "in

good faith and in the absence of fraud", it should not be held answerable in damages to a member who was wrongfully disciplined by a Local Union. *International Brotherhood of Electrical Workers v. N.L.R.B.*, 487 F.2d 1113, 1129 (D.C. Cir. 1972). In a recent case involving union discipline, the Second Circuit reaffirmed that an International Union's mere exercise of supervisory powers is insufficient to render the affiliated union an agent of the International and held that ratification would only occur "if [the International] affirmed the discipline imposed on plaintiffs *with full knowledge* that it was part of an overall scheme to suppress dissent in violation of the LMRDA." *Radonich v. House Wreckers Local 95 of Laborers International Union*, 817 F.2d 967, 973 (2nd Cir. 1987) (Emphasis added).

It is simply inconceivable that this International Union which engaged only in activities which were designed to *increase* minority participation in not only Local 201, but in all of its affiliated Local Unions across the country, could then be held vicariously liable because of those activities. See, *Harnischfeger v. Sheet Metal Workers*, 436 F.2d 351, 355-56 (6th Cir. 1970) (International not liable where advised of unlawful conduct and counseled against it); *Bearfoot v. Teamsters*, 424 F.2d 101 (10th Cir. 1970), *cert. den.*, 400 U.S. 950 (1970) (International not liable where it responded to local's request for advice).

If this decision is permitted to stand, International Unions' mediating influences not only in the Title VII context, but in the management-labor dispute context will be lost. International Unions which attempt to adjust problems will be doing so at their own peril. In many cases where the International's influence is most needed, the International will refrain from acting to avoid incurring vicarious liability. This is a problem which will affect not only this International Union but International

Unions nation-wide. Thus the decision simply cannot be reconciled with this Court's enunciation of the national labor policy in this area.

C. The Decision Conflicts With The Congressional Goal Of Maximizing Local Union Autonomy And Self-Government Embodied In The Labor-Management Reporting And Disclosure Act of 1959.

In 1959, Congress passed the Labor-Management Reporting & Disclosure Act (The Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.*, to maximize Local Union autonomy and self-government. The provisions of Title III of the Landrum-Griffin Act reflect the congressional recognition that a Local Union is an entity separate and apart from its parent International. Thus, 29 U.S.C. § 402(h) defines "trusteeship" as any "receivership, trusteeship, or other method of supervision or control whereby a labor organization *suspends the autonomy* otherwise available to a subordinate body under its constitution or bylaws." (emphasis added). In an effort to preserve maximum "local self-government," Congress severely limited the grounds upon which an international may rely in imposing trusteeships (See 29 U.S.C. § 462), and provided jurisdiction for federal court challenges to Internationally-imposed trusteeships. (See 29 U.S.C. 464)

In view of this Congressional policy, the question becomes what could the International have done under law to remedy the problem which the Court below determined existed in the Local Union? The only disciplinary action open to the International would have been to place Local 201 under trusteeship pursuant to the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §§ 402, 462, 464 and 481). However, it is clear that had the International done so, such a trusteeship would have been set aside by a federal court, since there were no objective facts upon which the International could have relied in placing the Local Union under trusteeship for engaging in race discrimination.

The Local Union would certainly have relied upon its exclusion from the "Washington Plan" as evidence that the Federal Government had already determined that minority participation in Local 201 was adequate and not discriminatory. The "Washington Plan" was issued by the Secretary of Labor under Executive Order 11246 to require increased minority hiring on federally-involved construction projects in the Washington, D.C. SMA. Local 201 was specifically exempted from coverage under the Washington Plan because the Secretary of Labor found that existing minority participation in Local 201 did not require remedial action. The Secretary expressly found that the reinforced iron workers and certain other trades "contain a significant proportion of minority workers." (41 C.F.R. § 60-5.11 (1975)).[4]

In view of the fact that all of the International's actions were designed to *increase* minority participation, and in the face of no viable disciplinary action which could have been taken under law, the decision is contrary to the principle enunciated by the Fifth Circuit in *Terrell v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). In *Terrell*, the court noted that whether a party involved in an established Title VII violation may be excused from liability turns upon whether that party has proven to the full satisfaction of the court that it has taken every reasonable step to bring employment practices into compliance with the law. Clearly, the International Union in this case has taken every reasonable

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[4] Based upon this Court's decision in *General Builders v. Pennsylvania*, 458 U.S. 375 (1982), the Court below relieved the Employer Council of liability for the discriminatory practices on the ground that there was no evidence that it had knowledge that the referral practices of Local 201 operated in a discriminatory manner, relying upon Local 201's exclusion from the "Washington Plan." (*Berger*, 843 F.2d at 1437). The International Union had just as much of a right as the Employer Council to rely upon Local 201's exclusion from the "Washington Plan" in believing that no racial discrimination was occurring in the Local Union.

step to bring the employment practices within its affiliated Local Unions into compliance with Title VII and should not now be penalized for taking those steps.

At issue herein is the continued vitality of the historic internal labor union structure which balances the needs of Local Unions for democratic self-government against the reviewing and supervisory role traditionally held by International Unions. The LMRDA recognized both concerns by allowing Local Unions to exercise maximum self-government while authorizing Internationals to remove Local autonomy where necessary to preserve the union as an institution. Congress has specifically considered the issue of International liability and concluded "that an affiliated Local Union is not an agent of its parent union by virtue of that relationship or the parent's reservation of control over the activities of the Local." *Sen Comm. on Labor and Public Welfare, Equal Treatment of Craft And Industrial Workers*, Sen. Rpt. No. 438, 94th Cong. 1st Sess. 25 (1975). The decision in this case simply cannot be reconciled with these long-standing principles of Union autonomy.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari in this case should be granted in view of the significant conflict between this decision and the national labor policy enunciated by this Court and Congress over many decades. In addition, there are numerous policy reasons why the decision in this case should not be permitted to stand.

If the International Union had done nothing in this case and had taken no affirmative steps to assist minorities in gaining access to the ranks of the ironworkers' trade, it would not have been held vicariously liable since it would have simply turned a blind eye to the problem, and left behind no "trail of evidence" of its involvement. The holding in this case will have the effect of discour-

aging other International Unions from taking affirmative steps to end racial discrimination or to assist minorities, since to do so may lead to the International being held vicariously liable for the actions of affiliated Local Unions in carrying out those affirmative action programs. This will turn back the hands of time in the area of International Unions looking for solutions to discrimination problems and will do a disservice to the goal of bringing minorities into the Labor Movement. Thus, the decision as it now stands hinders rather than advances the purposes for which Title VII was enacted.

Respectfully submitted,

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October 1988

APPENDIX

APPENDIX

STATUTES

42 USC § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC § 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

(b) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(c) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(d) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

(e) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compen-

sation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 . . .

(f) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 USC § 2000e-5 . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, of the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title. -

88-699

No. ———

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6217

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN LOCAL 201, *et al.*,
Appellants

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 75-01743)

Argued October 27, 1987

Decided April 5, 1988

Gary L. Lieber for appellant Construction Contractors Council/AGC Labor Division, Inc. *John A. McGuinn* also entered an appearance for appellant.

Sally M. Tedrow, with whom *James R. O'Connell* and *Ellen O. Boardman* were on the brief, for appellants Local 201, Apprenticeship Committee and Training Program.

Victor J. Van Bourg, with whom *Laurence E. Gold* was on the brief, for appellant International Association of Bridge, Structural and Ornamental Iron Workers.

John L. Oberdorfer and *John F. Dienelt*, with whom *Thomas D. Roberts* and *Andrew S. Newman* were on the brief, for appellees.

Thomas W. White, with whom *John Payton* was on the brief, for *amicus curiae* NAACP Legal Defense and Educational Fund, Inc., urging affirmance.

Michael E. Kennedy was on the brief for *amicus curiae* Associated General Contractors of America, Inc., urging reversal.

Before: EDWARDS, STARR and D. H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by EDWARDS, STARR and D.H. GINSBURG, *Circuit Judges.*

PER CURIAM: This case involves a class action brought by eight black construction workers alleging racial discrimination under 42 U.S.C. § 1981 (1982) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982). The plaintiffs charged that various requirements for admission to Local 201 of the Iron Workers Reinforced Rodmen (the "Union") and to its international union, the International Association of Bridge, Structural and Ornamental Iron Workers (the "International"), discriminatorily denied black rodmen the benefits of union membership. The plaintiffs sued both the Union and the International, along with the Union's Apprenticeship Committee, the National Iron Workers and Employers Training Program, and the Construction Contractors Council/AGC Labor Division, Inc. ("CCC"), an organization that negotiated collective bargaining agreements with the Union on behalf of most employers of rodmen in and around Washington, D.C. Suit was filed in 1975, the case went to trial in 1981, and the District Court rendered its decision in 1985.

The trial court's decision raises very difficult problems for this court. Having received over eighty-five pages of proposed findings of fact and conclusions of law from the plaintiffs in December 1981, the District Court adopted them almost verbatim after a lapse of three and a half years, retaining most of the plaintiffs' typographical errors but deleting their references to the record, thus hampering review. Not surprisingly, the District Court found all of the defendants liable for all of the alleged violations of Title VII and section 1981. The court's subsequent remedial order again copied the plaintiffs' proposal; an amended order was issued in April 1986. The defendants then appealed from the trial court's decision and order.

In considering this appeal, we embrace the view expressed by a number of circuits in strongly disapproving the procedure followed by the trial court in reaching judgment in this case. *See, e.g., EEOC v. Federal Reserve Bank*, 698 F.2d 633, 639-42 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984), and cases cited therein. While "the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal," "it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves." *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). Indeed, this is surely the case here, where the appellants assert that "the District Court's uncritical acceptance of plaintiffs' proposed findings . . . did not provide the even-handed consideration of the evidence necessary to a fair adjudication of the issues." Brief of Appellant CCC at 28. After *ten years of litigation* in District Court, the appellants had a right to expect something more.

Because of the state of the record on appeal, this case was needlessly given "complex" treatment under this cir-

cuit's Case Management Plan, and then it required more exacting scrutiny than this court ordinarily accords the District Court's findings. A meticulous review of the District Court's conclusions uncovered a number of clearly erroneous factual findings and several errors of law. We therefore reverse in part and affirm in part.

I. Background

Rodmen are construction workers who handle and position steel rods for reinforcing concrete and other building materials. Most of the rodmen who worked in the Washington, D.C., area in the early 1970s were employed through referrals by the Union, pursuant to a series of collective bargaining agreements between the Union and CCC. The Union's referral system ensured that Union members were offered employment opportunities before jobs were made available to non-Union permit workers who applied for positions through the Union's hiring hall. When Washington's commercial construction industry entered a slump in 1975, Union membership became especially valuable, because limited employment prospects prevented permit workers from obtaining regular employment.

Admission to the Union always has been by examination. The prerequisites for taking the entrance exam, however, have varied over time. Four different sets of prerequisites are relevant to the adjudication of this case.

1965-February 1971. During this period, there were two routes to the exam: (1) by permission of the Union's Executive Committee, which could grant leave, in its discretion, to rodmen with an unspecified amount of experience to take the exam; and (2) by completion of the two-year Apprenticeship Program, admission to which was contingent upon the applicant (a) being between 18 and 31 years of age, (b) possessing a high school diploma, and (c) being physically fit.

February 1971-June 1971. There were also two paths to the exam at this time. (1) Those who completed the Apprenticeship Program could take the usual exam. (2) All rodmen with two years' experience were eligible to take a *special* exam—not the one given by the Union before or after this period—which had a higher failure rate. Because all experienced rodmen were allowed to sit an entrance exam without participating in a Union-supervised educational program, these five months are referred to as the "Open Period."

June 1971-September 1972. Throughout this period, only rodmen who had completed the Apprenticeship Program were permitted to take the exam.

September 1972-October 1975. Once again, there were two tracks to the exam. (1) Completion of the Apprenticeship Program, whose admission requirements were unchanged, provided a ticket to the exam. (2) In addition, the Training Program was established, primarily to allow experienced minority workers to gain access to the exam and thus to Union membership. Although race was not a criterion for admission, special efforts were made to recruit minority workers. Participants in the Training Program had to be (a) physically fit, and (b) 31 years of age or older. Unlike the Apprenticeship Program at that time, the Training Program lacked a high school diploma requirement.[1] Moreover, trainees—but not apprentices—were sometimes allowed to take the exam after a minimum of six months' instruction, even though both educational programs were two years long.

Throughout this entire perod, no applicant was guaranteed acceptance into an educational program merely because he met the entrance requirements. Enrollment was always limited, and many who qualified for admission

[1] The Apprenticeship Program's high school diploma requirement has since been eliminated. Brief of Appellants Local 201, Apprenticeship Committee and Training Program ("Brief of Local 201") at 40 n.37.

were either rejected or not permitted to apply. Once admitted to either program, however, no enrollee was asked or compelled to discontinue participation because of unsatisfactory performance; the only ground for expulsion was failure to meet one of the enrollment requirements described above. Completion of one of the programs resulted almost automatically in Union membership, since virtually all examinees, with the exception of those tested during the Open Period, passed the test.[2]

Prior to the passage of Title VII, the membership of Local 201 was overwhelmingly white. The Union's racial composition changed after 1965, when Title VII took effect, but only gradually. At the state of 1967, only four of approximately 200 members were black. Trial Finding ("Tr. F.") 63. Four years later, the Union numbered 16 black and 260 white members. Tr. F. 63. Although black membership increased markedly with the advent of the Open Period, the percentage of blacks entering the Union was plainly smaller than the percentage of blacks among non-Union permit workers. For example, while approximately 40% of those admitted to the Union in the three years prior to the initiation of this suit were black, Brief of Local 201 at 18, blacks comprised 50-60% of non-Union workers seeking employment through the Union's hiring hall. Brief of Appellees at 7.

On October 21, 1975, six black rodmen who were not members of the Union filed suit against all of the defendants, alleging racial discrimination in violation of Title VII and section 1981. The gravamen of the plain-

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[2] All white rodmen who took the normal entrance exam during this lengthy period passed it, whereas 97.6% of black rodmen (including five workers who took the exam twice) received passing scores. Brief of Local 201 at 19. During the Open Period, however, when a different exam was given to non-apprentices, 70.6% (24 of 34) of the white examinees and only 35.3% (12 of 34) of the black examinees passed this special exam. Trial Finding ("Tr. F.") 76. The appellants do not challenge the accuracy of this finding.

tiffs' complaint is that the preconditions to Union membership in the early 1970s—in particular, the requirement that apprentices hold a high school diploma and the requirement that rodmen enroll in either the Apprenticeship or the Training Program before taking the Union's entrance exam—excluded a higher proportion of blacks than whites from Union membership and that these preconditions could not be justified on work-related grounds. Pursuant to a pretrial stipulation by the parties, the District Court certified the following two classes on July 26, 1976:

> 1) All black persons who have applied for or sought, from representatives of Local 201 or the International, membership in Local 201 and, in connection therewith, the International or who have applied for or sought, from representatives of Local 201, the Apprenticeship Program or the Training Program, admission to the Apprenticeship Program and/or the Training Program and who have been or might be excluded from Local 201 and, in connection therewith, the International or the Apprenticeship Program or the Training Program or any of the above by the alleged discriminatory practices of the Defendants and who could have filed timely charges with the EEOC when their class representatives filed such charges or who could have filed timely lawsuits when the class representatives filed the instant lawsuit.
>
> 2) All black persons who have been referred for employment by Local 201 or who have applied to Local 201 for referral for employment by any means, including filling out a referral slip, or presenting themselves at Local 201 and requesting representatives of Local 201 to refer them for work, and who have been or might be discouraged from applying for membership in Local 201 and in connection therewith, the International, and/or Apprenticeship Program and/

> or the Training Program by the allegedly racially discriminatory practices of the Defendants and who could have filed timely charges with the EEOC when their class representatives filed such charges or who could have filed timely lawsuits when their class representatives filed the instant lawsuit.

Order (July 26, 1976), *reprinted in* Record Excerpts ("R.E.").

On March 6, 1978, the District Court allowed the six named plaintiffs to amend their complaint by adding two black rodmen—Simmons and McMillian—because it appeared that the original six might not include suitable representatives of both classes. Memorandum and Order (Mar. 6, 1978), *reprinted in* R.E.

After the District Court denied separate motions for summary judgment by the Apprenticeship Committee, the International, and CCC, the case was tried during the summer and fall of 1981. More than three and a half years later, on June 7, 1985, the District Court issued its Trial Findings, merely copying, with insignificant changes, the proposed findings of fact and conclusions of law submitted by the plaintiffs on December 18, 1981. The court found all of the defendants liable for the allegedly racially discriminatory admissions policies of the Union dating back to at least 1965, as well as for retaliatory actions alleged to have been taken against several named plaintiffs.

The District Court issued a remedial order on December 10, 1985, which was superseded by an Amended Order handed down on April 10, 1986. The Amended Order increased access to the entrance exam or to Union membership for experienced black rodmen, and provided for future proceedings to determine awards of backpay and damages. In addition, the court ordered the Union to return money collected from class members pursuant to a uniform levy on all Union workers to pay the

Union's legal expenses in connection with this action. The defendants appeal from the District Court's Trial Findings and Amended Order, contending that many of the District Court's findings of fact were clearly erroneous, that a large number of its legal conclusions were also mistaken, and that the court abused its discretion in choosing remedies.

II. Standard of Review

Federal Rule of Civil Procedure 52(a) provides in part that "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The appellants have asked this court, however, to perform a more rigorous appraisal of the District Court's findings than this rule prescribes. They contend that the trial judge's almost verbatim transcriptions of the plaintiffs' extensive proposals do not constitute genuine "findings" of fact, and thus that *de novo* review, or something approaching it, is appropriate in the unique circumstances of this case.

We disagree. Although we strongly disapprove of the District Court's wholesale adoption of the plaintiffs' proposed findings—especially in a case of this magnitude—we adhere to the view that *de novo* review "would be wholly inconsistent with the function of an appellate court." *Southern Pac. Communications Co. v. AT & T*, 740 F.2d 980, 984 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). An appellate court is generally ill-equipped to conduct *de novo* review, and the assignment of that task to courts of appeals would waste judicial resources. *De novo* review, moreover, would be contrary to the plain meaning of Rule 52(a), which requires courts to set aside factual findings only if they are "clearly erroneous." It would also contravene the settled doctrine of this court and the Supreme Court. As the Court recently stated:

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. . . . Nonetheless, our previous discussisons of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985).[3]

We adhere to the standard of review enunciated in Rule 52(a) and shall set aside factual findings only if we deem them clearly erroneous; however, we note that

---

[3] CCC contends that the Supreme Court created an exception to the "clearly erroneous" standard in *Anderson* and mandated *de novo* review by an appellate court whenever a trial court has "uncritically accepted findings prepared without judicial guidance by the prevailing party." *Anderson*, 470 U.S. at 572; *see* Brief of Appellant CCC at 28-30, 40-41. We reject this reading of *Anderson*. In that case, after noting that its earlier decisions had without exception upheld the "clearly erroneous" standard even when a trial judge had accepted proposed findings verbatim, the Court found that the district court had *not* "uncritically accepted" proposed findings, and thus that there was "no reason to subject those findings to more stringent appellate review than is called for by the applicable rules." 470 U.SC. at 572-73. We recognize that this language is enigmatic, but we do not believe that it admits an exception to the standard of review enunicated in Rule 52(a). The Supreme Court nowhere in *Anderson* so much as mentions the possibility of *de novo* review by an appellate court, nor does it hold that the standard of review under Rule 52(a) fluctuates with the quality of a district court's efforts at factfinding. We therefore see no reason to depart from our precedents in this regard. If the record below does not permit a confident assessment of the trial court's findings, the proper course for an appellate court is to remand for further factfinding, not to engage in its own guesswork. *See Andre v. Bendix Corp.*, 774 F.2d 786 (7th Cir. 1985). We are fortunate indeed that the record in this case allows us to dispose of all the issues raised on appeal without the necessity of a remand.

the function of appellate review that we must undertake in a case of this sort is substantially different (and more difficult) than what is normally required. In *Southern Pacific*, we explained that when a trial judge "abdicate[s] to a party his duty to provide a reasoned explanation for his decision" and merely copies submitted proposals, it is incumbent on this court to check the adopted findings against the record "with particular, even painstaking, care." 740 F.2d at 984; *see also Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n.3 (9th Cir. 1984) ("special scrutiny"); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 639-42 (4th Cir. 1983) ("careful scrutiny" is necessary and findings must be "more narrowly" examined when trial court merely reprints proposed findings), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). The "special care" we devote to reviewing "findings [that] were not initially penned by the district judge," *Valentino v. United States Postal Serv.*, 674 F.2d 56, 60 n.2 (D.C. Cir. 1982), differs from that which we ordinarily display, not in the test that we apply to a particular finding of fact—individual findings will only be reversed if *clearly* erroneous—but in the volume of evidence we sift in judging the correctness of such findings and in the number of discrete findings we review without benefit of express, thoroughly supported allegations of error by the opposing party. Although we undertake with great reluctance what in this case has proven a Herculean task, the District Court's inexplicable failure to reason independently and to address the defendants' leading arguments leave us no choice.

III. Class Action Issues

The appellants raise four objections to the District Court's certification of the two plaintiff classes in this case. First, they argue that the District Court failed to

ascertain whether the requirements of Federal Rule of Civil Procedure 23(a) were met with respect to each of them, and that this court should therefore remand for such a determination. Second, the appellants contend that the District Court failed to set temporal boundaries to the classes, and that a remand is necessary to allow it to do so. Third, the appellants submit that none of the named plaintiffs adequately represents the class of those black permit workers who were allegedly injured by the Apprenticeship Program's high school diploma requirement in violation of Title VII and section 1981. Fourth, they claim that the plaintiff class should be limited to those who actually applied for admission to the Union or one of its educational programs, and that the second class of "discouraged" nonapplicants should be decertified.

We find the first two arguments meritless. We agree, however, that none of the named plaintiffs is a suitable representative of those who were allegedly wronged by the Apprenticeship Program's high school diploma requirement; accordingly, that portion of the plaintiffs' case should not have been permitted to go forward to judgment, and the District Court's decision on this issue must be reversed. The appellants' fourth objection is misguided insofar as it applies to the plaintiffs' remaining challenge to the Union's requirement that experienced rodmen enroll in an educational program before taking the entrance exam.

A. *Possible Failure to Conduct a Rule 23(a) Analysis*

The Supreme Court has stated that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

The two classes in this case were conditionally certified upon stipulation by all the parties. Order (July 26, 1978), *reprinted in* R.E. It is unclear, however, whether the District Court performed the required analysis regarding the prerequisites of Rule 23(a). Nevertheless, we find the District Court's failure to articulate the reasons for its decisions an insufficient reason to remand. The defendants have not pointed to any possible errors in the District Court's definition of the classes apart from those considered separately below. *See* Brief of Local 201 at 34-39. Nor have we identified any ourselves. In the absence of any reason to suspect that the District Court's decisions in this regard were mistaken, we cannot label the court's silence an abuse of discretion warranting a remand. *See Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1380 n.24 (D.C. Cir. 1980).

B. *Temporal Limits to the Classes*

The appellants contend that, while the class definitions contained in the 1976 certification order and reproduced in the Amended Order "purport[] to accord with relevant time frames," the District Court's "numerous errors in construing what such limitations actually mean . . . require a remand for the purpose of specifically defining both backward and forward class limitations by date, even if [the] class definition[s] (at least as to time) [are] to be adhered to." Brief of Local 201 at 49. We reject this contention as frivolous. The appellants, by their own admission, do not find fault with the temporal aspects of the District Court's class definitions. Hence, there is no reason at all to remand on this point. To the extent that the appellants quarrel with the District Court's *application* of this unquestionably acceptable definition in specifying remedies, their objections are properly considered under that heading.

C. *The Ability of Class Representatives to Challenge the Apprenticeship Program's High School Diploma Requirement*

As the appellants correctly note, the plaintiffs' challenge to the Apprenticeship Program's admission requirements focused exclusively on the rule that apprentices hold high school diplomas, and the District Court found this requirement alone to violate Title VII and section 1981. *See* Brief of Local 201 at 41; Tr. F. 85-100. No objections were raised to the requirements that apprentices be physically fit or that they be under thirty-one years of age.

The Supreme Court has "repeatedly held [that] a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). The plaintiffs may therefore only bring a class action challenging the high school diploma requirement of the Apprenticeship Program if one of the named plaintiffs was allegedly injured by that requirement. Hence, this part of the action may not proceed unless one of the eight named plaintiffs was, during the Title VII or section 1981 limitations period, refused admission to the Apprenticeship Program or discouraged from applying for admission because he lacked a high school diploma, notwithstanding his having met the age and fitness requirement at that time.

Two of the named plaintiffs—McMillan and Simmons —graduated from high school, and thus may not serve as class representatives. Tr. F. 18-19. The other six did not have high school diplomas at times relevant to this suit. All of them, however, either were too old to challenge the high school diploma requirement within the statutory limitations periods, or were not injured by it

because they had no interest in enrolling in the Apprenticeship Program during those periods.

A plaintiff may bring a *Title VII* action only if he has first filed charges with the Equal Employment Opportunity Commission ("EEOC") within 180 days of suffering injury in violation of the statute. 42 U.S.C. § 2000e-5(e) (1982). Thus, one of the six named plaintiffs without a high school degree could challenge the Apprenticeship Program's high school diploma requirement only if, within 180 days of filing charges with the EEOC, he was under 31 years of age and physically fit, and if he was at that time denied admission or was discouraged from applying because he lacked a high school diploma. Plaintiff Lewis was the first of the named plaintiffs to file charges with the EEOC. He did so either in December 1974, or on January 13, 1975, depending upon which of the District Court's inconsistent findings is correct. *Compare* Tr. F. 5 *with* Tr. F. 15. The 180-day limitations period under Title VII therefore began to run in June or July 1974. However, Lewis had turned 31 prior to that date, as had all of the other plaintiffs who had not graduated from high school.[4] None of the six could therefore demonstrate that he was injured by the Apprenticeship Program's high school diploma requirement after June 1974, because all were or would have been excluded by virtue of their age, and the age limit was never challenged or found to be discriminatory. Hence, the class action challenge to the high school diploma requirement may not be brought under Title VII.

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[4] The years in which these six plaintiffs turned 31 are as follows: Berger (1967); Tucker (1968); Jackson (1970); Kirkland (1970); Bellamy (1972); and Lewis (1973). The District Court's finding regarding Bellamy's age, *see* Tr. F. 17, was clearly erroneous. Plaintiffs' counsel acknowledged in oral argument before this court that Bellamy was born on September 18, 1941; his thirty-first birthday therefore fell on September 18, 1972.

Although *section 1981* does not contain its own statute of limitations, 42 U.S.C. § 1988 requires that the most nearly analogous District of Columbia statute of limitations be applied to suits under section 1981. In *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416 (D.C. Cir. 1986), this court held that the most closely analogous period for purposes of section 1981 is that set by D.C. CODE ANN. § 12-301(8) (1981), which specifies a three-year limitations period for personal injury claims not specified elsewhere in the D.C. Code. In reaching that decision, however, the court faced only the question whether the three-year statute of limitations for specified personal injury claims or the one-year period provided by the D.C. Human Rights Act, D.C. CODE ANN. § 1-2544 (1981), applied to suits under section 1981. The court did not determine whether the one-year limitations period for most intentional torts, D.C. CODE ANN. § 12-301(4), or the three-year period applicable to other personal injuries is more appropriately applied to section 1981 suits. Although a majority of the three-judge panel argued at length that the three-year limitations period applied, *see Banks*, 802 F.2d at 1426-29, the majority recognized that it was "consider[ing] the issue in dicta only, and only in order to answer" objections raised in a concurring opinion. *Id.* at 1427. The question whether a one-year or a three-year limitations period governs actions under section 1981 therefore remains open.

We need not resolve it now. Regardless of which limitations period is correct, none of the six original plaintiffs fulfilled the requirements for challenging the high school diploma requirement under section 1981. If the one-year period should be applied, then the plaintiffs' suit was plainly foreclosed, because all six turned thirty-one prior to October 21, 1974, the date one year before suit was filed. *See* note 4 *supra*. If the three-year period is proper, then five of the six would once again have been excluded from the Apprenticeship Program by reason of

age; only Lewis was under thirty-one years of age on October 21, 1972. However, Lewis testified at trial that he did not apply for admission to the Apprenticeship program between October 21, 1972, and his thirty-first birthday, and he never claimed that he would have applied had there been no high school diploma requirement. He apparently only thought of applying to the Apprenticeship Program *after* he had turned thirty-one: "I didn't apply for the apprenticeship program because they said you couldn't get in over 30." Transcript ("Tr.") at 471. Since Lewis did not allege injury by the Apprenticeship Program's high school diploma requirement, he cannot serve as the representative of a plaintiff class contesting the lawfulness of that requirement under section 1981. The class action challenging the high school diploma requirement under both Title VII and section 1981 therefore fails for want of a suitable representative.[5]

The plaintiffs did, however, satisfy the jurisdictional prerequisites for assailing the Union's requirement that experienced workers enroll in either the Apprenticeship or the Training Program before taking the entrance exam. Although the appellants have not denied that the named plaintiffs adequately represent the class of those allegedly injured by this requirement, and thus have waived any objection they might have raised, *see Banks*, 802 F.2d at 1427, we note that Kirkland was experienced, physically fit, and desirous of taking the entrance exam

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[5] *If* we viewed the Apprenticeship Program's high school diploma requirement as part of a pervasive "pattern of discrimination," *see McKenzie v. Sawyer*, 684 F.2d 62, 73 (D.C. Cir. 1982), then the plaintiffs might have been able to challenge it even though they alleged injury by the requirement outside of the limitations period, since the requirement, by hypothesis, would have been part of a connected series of violations that extended into the limitations period and at least one element of which was properly contested within that period. However, we reject the suggestion that such a pattern existed in this case, *see* Part IV.E *infra*, and reverse the District Court's contrary finding, Tr. F. 82, as clearly erroneous.

within six months of the filing of charges with the EEOC on his behalf and within six months of the filing of this law suit. *See* Tr. F. 6, 14. Because this requirement was in effect since the end of the Open Period in June 1971, all class members who were injured by the requirement after that date may join in this suit and any recovery under it.

D. *Should Discouraged Nonapplicants Be Part of the Plaintiff Class?*

The appellants contend that the class definition should not have included "persons who have never actually applied for membership in Local 201, or for admission to the training or apprenticeship programs." Brief of Local 201 at 46. This objection apparently derives from a misunderstanding of at least part of the plaintiffs' theory of liability. The plaintiffs' contention with respect to the educational prerequisite for taking the entrance exam, if not with regard for the Apprenticeship Program's high school diploma requirement, is that compelling experienced rodmen to participate in some educational program for six months or more before allowing them to take the exam was itself unlawful. There is no reason why those who were unwilling to subject themselves to an allegedly unlawful regimen but who would have taken the exam had this obstacle not been placed in their path, may not challenge that requirement. We therefore see no merit in the appellants' objection insofar as it applies to the plaintiffs' attack on the instructional prerequisite to sitting the entrance exam.

IV. PLAINTIFFS' STATISTICAL PROOF OF DISCRIMINATION

A. *Legal Framework*

1. *Law Governing Establishment of a Prima Facie Case by Statistical Proof*

The legal framework governing plaintiffs' claims is straightforward. Under now-familiar Title VII law,

plaintiffs bear the burden of establishing a prima facie case of racial discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). In seeking to prove that facially neutral employment criteria fall more harshly on blacks than whites, plaintiffs may rely on statistical evidence tending to show that those criteria "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). If the racial make-up of a selected group (in this case, those who became Union members) differs significantly from that of the pool from which it was selected, discrimination may be inferred. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 339 n.20 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Once this is demonstrated, a prima facie case has been established, and the burden shifts to defendants to articulate a legitimate nondiscriminatory reason for the challenged employment practice. *Burdine*, 450 U.S. at 253; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *McKenzie v. Sawyer*, 684 F.2d 62, 71 (D.C. Cir. 1982). Defendants may also attempt to undermine plaintiffs' prima facie case by attacking the validity of plaintiffs' statistical evidence, or by introducing statistical evidence of their own showing that the challenged practice did not have racially disproportionate results. *See Teamsters*, 431 U.S. at 360; *Segar v. Smith*, 738 F.2d 1249, 1268 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

The degree of disparity between the expected and actual racial composition of the membership necessary to support an inference of discrimination is commonly viewed in terms of standard deviations. The Supreme Court has stated that a difference of approximately two

to three standard deviations between expected and actual results is sufficient to demonstrate that the disparity is the product of something other than chance. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

There is, however, a large gap between two and three standard deviations, and thus the Supreme Court's teaching in this respect has not been entirely dispositive. Under this circuit's precedent, in most instances a difference of just under two standard deviations has been deemed sufficient to establish a prima facie case. *See Palmer v. Shultz*, 815 F.2d 84, 91-92 (D.C. Cir. 1987). As we shall presently see, the statistical disparities in this case are well above two standard deviations; we are thus not faced with nettlesome issues such as whether 1.96 or 2 standard deviations ought to be the standard, or whether a one-tailed or two-tailed statistical test applies.[6]

A difference of two standard deviations corresponds roughly to a five percent probability that the disparity is the result of chance; this five percent standard is commonly referred to as the ".05 level of significance." *See Segar v. Smith*, 738 F.2d at 1282-83. Thus, if the likelihood that a fluctuation from expected results occurred by chance is five percent or less, a statistically significant difference is proved, and a prima facie case of discrimination is established.

It is, of course, elementary that *intent* to discriminate is a necessary element of Title VII *disparate treatment* cases.[7] But here too, statistics play an important part.

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[6] For a thorough explanation of the use and role of statistical evidence in Title VII cases, including the nuances of one-tailed or two-tailed tests, see *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987).

[7] The standards and order of proof in section 1981 cases have been held to be identical to those governing Title VII disparate treatment cases. *See Carter v. Duncan-Higgins, Inc.*, 727 F.2d 1225 (D.C. Cir. 1984); *see also Stallworth v. Shuler*, 777 F.2d 1431,

The basic office of statistical proof is to seek to eliminate non-discriminatory explanations for racial disparities; thus a statistically valid showing of a substantial disparity between expected and actual results may give rise to an inference of discriminatory intent. *Teamsters*, 431 U.S. at 336 n.15; *Hazelwood*, 433 U.S. at 307-08.

What is more, this court has squarely held that, even absent specific anecdotal evidence of discrimination, statistical proof alone may establish a prima facie case of *intentional* discrimination. *Segar v. Smith*, 738 F.2d at 1277-79, 1286-87; *see also McKenzie v. Sawyer*, 684 F.2d 62, 71 (D.C. Cir. 1982) ("Statistics alone will suffice to show illegally discriminatory treatment, if they are condemning enough.") In the course of enunciating this rule, the court in *Segar* rejected the proposition that to establish intentional discrimination a showing of "gross disparities," rather than mere statistically significance disparities, is required. *Segar v. Smith*, 738 F.2d at 1277-78.

2. *Law Governing Rebuttal of a Statistically Based Prima Facie Case*

Once plaintiffs establish a prima facie case, the burden shifts to the defendants to articulate a legitimate non-discriminatory explanation for the statistical disparity. *See Segar v. Smith*, 738 F.2d at 1267-68; *Davis v. Califano*, 613 F.2d 957, 961-62 (D.C. Cir. 1979).[8] Alterna-

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1433 (11th Cir. 1985). As in Title VII disparate treatment cases, section 1981 prohibits only intentional discrimination. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). To make out a claim under section 1981 a plaintiff must demonstrate that he was (1) treated differently than others who were similarly situated (2) because of his race.

[8] If defendants identify a racially neutral employment practice in attempting to explain the disparities, a disparate *impact* analysis is implicated. This is so because defendants will have identified a racially neutral business practice as the cause for racial disparities;

tively, defendants can also meet their burden by demonstrating that plaintiffs' statistics are so flawed as to be meaningless, or by introducing alternative statistical evidence. *See Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) ("If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own."); *Segar v. Smith*, 738 F.2d at 1267-68.

We hasten to observe that, as the Supreme Court has stated, "statistics are not irrefutable." *Teamsters*, 431 U.S. at 340. After plaintiffs put on a statistical case, it remains open on rebuttal for defendants to rely on all types of evidence, statistical and otherwise. In the typical case, defendants' rebuttal case will likely focus on (1) inadequacies in the plaintiffs' statistical case, (2) an alernative, more favorable statistical case, or (3) a non-discriminatory explanation for the statistical disparities. Since the ultimate burden of persuasion rests always with plaintiffs, *see United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Segar v. Smith*, 738 F.2d at 1284, district courts must weigh in the balance *all* the evidence—both plaintiffs, statistical proof and defendants' rebuttal—in reaching the ultimate conclusion as to liability. Again, we draw from the Supreme Court's teaching:

> Whether . . . a [statistical] analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, *in light of all the evidence*, that it is

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under traditional disparate impact analysis, they must also justify the racially neutral employment practice as demanded by business necessity. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *see also Segar v. Smith*, 738 F.2d at 1270; *id.* at 1303-04 (Edwards, J., concurring).

more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Bazemore v. Friday, 106 S. Ct. 3000, 3009 (1986) (per curiam) (Brennan, J., concurring for a unanimous Court on this point) (emphasis added).

B. *Plaintiffs' Statistical Challenge to the Union's Educational Prerequisite to the Journeyman Exam*

In light of the governing legal framework, we turn again to the case at hand. At bottom, plaintiffs claim that (1) unnecessary barriers to taking the journeyman [9] exam prevented (or delayed) the entry of otherwise qualified workers into Union ranks, and (2) those barriers disproportionately disadvantaged black rodmen. The proportion of eligible blacks who became Union members, plaintiffs contend, is much lower than the proportion of eligible whites who did. Inasmuch as the high school diploma requirement is no longer part of the case, *see supra* Part III.C.,[10] the employment practices we are called on to consider are two: the Apprenticeship Program and the Training Program. It bears emphasis that plaintiffs' challenge is simple and direct: *An educational prerequisite—either Apprenticeship or Training—discriminatorily delayed union membership for qualified black permit workers.* According to plaintiffs the educational prerequisite is utterly unnecessary if one can pass the journeyman exam. Under this theory, since those workers who are sufficiently experienced to take (and pass) the exam without undergoing an educational pro-

[9] Full Union members are sometimes referred to as "journeymen" or "journeymen rodmen," and the exam as the "journeyman exam."

[10] No proper challenge to the high school diploma requirement was made; as a result, we have no occasion to consider either statistical model by which plaintiffs sought to prove that the high school diploma requirement disproportionately excluded blacks from the Apprenticeship Program.

gram are disproportionately black, delaying membership by means of such a program is unlawfuly discriminatory.

1. *The Experienced Pool Analysis*

To prove that the Union's [11] educational prerequisite to the journeyman's exam is discriminatory, plaintiffs were required to demonstrate that during the period in question the percentage of eligible blacks who became Union members—i.e., took and passed the journeyman exam—was significantly lower than the percentage of eligible whites. To accomplish this, plaintiffs relied on an expert in labor economics, Professor Sheldon Haber, to contruct a statistical model, which he dubbed the "experienced pool" analysis.

Plaintiffs counted and identified as to race both potential and actual journeyman examinees, and compared the racial composition of the two groups. Complicating the analysis was the fact that the Union does not keep statistics regarding applications to take the exam; [12] thus, a proxy for identifying potential applicants had to be devised. One important fact was deemed to be of especial relevance in crafting a proxy. During the 1971 Open Period, *the Union itself relied on two years' experience as the criterion for determining who was qualified to take the journeyman exam.* In identifying a proxy for potential applicants, Professor Haber therefore took two years as the benchmark for sufficient experience to take the

[11] The parties have assumed, and we do not question their assumption, that Local 201, the Apprenticeship Committee, and the Training Program, although all separately named defendants, are jointly liable for any discriminatory conduct in the operation of the Apprenticeship and Training Programs.

[12] Even had the Union kept application records, they would have been of little value for purposes of the statistical analysis in this case, because the fact remains that the Union's educational prerequisite would have deterred experienced rodmen from applying to take the exam.

exam. With this benchmark in hand, Haber sought to identify non-member permit workers with at least two years' experience in order to determine the pool of "likely examinees." This pool was then compared to the pool of workers who actually took the exam, who were referred to as "actual examinees."

Another complication arose, however, in completing the analysis: Union pension records reflects workers' experience in terms of hours, not years. In consequence, Professor Haber had to calculate (or estimate) the number of hours that closely approximates two years' experience in the rodman trade. To determine this figure, Haber referred back to the examinees during the Open Period in 1971, and calculated the average number of hours worked by those examinees in the two years (1969 and 1970) prior to the Open Period. Professor Haber then calculated three averages: one for whites, one for blacks, and a combined white and black workers average. With these three averages, he chose the lowest average figure of 2150 hours (for whites) as the benchmark. This conservative methodology assured that the pool of likely examinees would not be skewed in favor of blacks.[13]

Plaintiffs then determined the percentage of workers with 2150 hours of experience who took the entrance exam (almost all of whom passed, and therefore became Union members, *see infra* n.15).[14] For the three-year period prior to the filing of this lawsuit (October 22, 1972 through October 21, 1975), the proportion of experienced whites who became Union members was 33.6 percent (49 out of 146); however, the proportion of experienced blacks who became members was a much lower

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[13] All permit workers who actually took the exam and became members of the Union were likewise included in the pool of likely examinees, regardless of the number of hours they had in fact worked.

[14] The task of identifying "actual examinees" was not difficult because the Union kept records of who took the exam.

15.3 percent (19 out of 124). *See* Tr. F. 82; *see also* Brief of Appellees at 63.[15] The possibility that a difference of this magnitude would occur by chance is approximately one in 1000, well over the requisite two standard deviations.[16] *See* Tr. F. 82. Plaintiffs also introduced evidence relating to Union admissions going back to 1967, all of which showed a statistically significant disparity between the proportion of eligible blacks and whites who became Union members. *See id.*

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[15] We note that the percentage of blacks who *took* the exam was 16.9 percent (21 out of 124). *See* Tr. F. 80. The minor difference between the percentage of those who took the exam and those who actually became members is attributable to the fact that two blacks failed the exam, and therefore did not become members. Despite this slight discrepancy, we agree that taking the exam can, for all practical purposes, be considered tantamount to becoming a Union member. Over the October 1972-October 1975 period, the pass rate on the journeyman exam for whites was 100 percent, and 97.6 percent for blacks, a difference that plaintiffs concede is not statistically significant. *See* Brief of Appellees at 69; *see also* Brief of Local 201 at 19.

[16] The District Court stated that the statistical divergence amounted to 3.3 standard deviations. *See* Tr. F. 82. We have doubts about the District Court's (or, more accurately, the plaintiffs') arithmetic accuracy. For the June 1, 1971-October 21, 1972 period, the measures of black and white new members as a percentage of "likely examinees' were 9.2 percent and 33.3 percent respectively, corresponding to 3.25 standard deviations, *see* Tr. F. 82; for the Ocotber 1972-October 1975 period, the respective percentages were 15.3 percent and 33.6 percent—a smaller disparity—yet the District Court found that this corresponded to 3.3 standard deviations. *Id.* It seems that either (or both) the 3.25 or 3.3 figure is incorrect. Although we doubt the accuracy of some of plaintiffs' specific statistics, we nonetheless do not doubt that the standard deviations were all above the requisite level of two. More fundamentally, defendants have not challenged these calculations, nor have they disagreed that if we accept plaintiffs' methodology, the figures show large disparities between the levels of whites and blacks achieving Union membership. We thus see no need to remand this already overlong case for clarification of the District Court's calculations.

Dr. Haber's experienced pool analysis thus showed that the difference in the proportion of eligible white and black achievement of Union membership far surpassed the five percent significance level. The District Court concluded, accordingly, that plaintiffs had established a prima facie case of racial discrimination. Tr. F. 81. The burden of rebutting the prima facie case then shifted to defendants.

C. *Defendants' Objections to Plaintiffs' Statistical Case*

As in the District Court, defendants launch several broad attacks on plaintiffs' statistical case. At least one contention, namely that Professor Haber was not a credible witness, can readily be disposed of. Credibility determinations are obviously for the trial court to make; our function on appeal is inconsistent with revisiting the credibility of an expert witness unless his testimony was "patently unsound." 9 W. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2586, at 740 (1971). We are unpersuaded that Professor Haber's testimony can fairly be dismissed on the basis of that daunting standard. However, defendants' other arguments merit fuller treatment.

1. *The Nature of Defendants' Burden on Rebuttal*

As we indicated above, to demonstrate that statistical evidence is invalid, the challenger must present "credible evidence that the statistical proof is defective" and "a plausible explanation of how the asserted flaw is likely to bias the results against his or her position." *Palmer v. Shultz*, 815 F.2d 84, 101 n.13 (D.C. Cir. 1987) (quoting D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION vii (1986 Supp.)). In *Bazemore v. Friday*, 106 S. Ct. 3000, 3009 (1986) (per curiam), Justice Brennan, concurring for a unanimous Court on this point, stated:

> [I]t is clear that a [statistical] analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.

To rebut, the challenger must adduce proof specifically showing that an alleged defect actually biases the results. Mere conjecture or general assertions of inadequacies in the opponent's statistical case, without demonstrating their effect on the results, will not suffice. *Palmer v. Shultz*, 815 F.2d at 101 (discussing *Bazemore*'s "dictates").[17] With this additional background, we turn to defendants' specific attacks on plaitiffs' prima facie statistical case.

2. *Defendants' Objections to Plaintiffs' Statistical Results*

Defendants argue that the experienced pool analysis is so flawed and divorced from reality as to be meaningless. Their challenges are several. According to defendants, the chosen benchmark of 2150 hours did not represent the cumulative experience of the Open Period examinees, but rather their average hours for the two prior years. Thus, the actual experience of the Open Period examinees most likely exceeded 2150 hours by a large margin. Defendants argue that this inacurracy renders the experienced pool analysis useless, because 2150 hours has no basis either as a measure of the actual experience relied on by the Union during the Open Period, or as an objective approximation of the amount of experience which qualifies one to take the exam.

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[17] Of course, there may be instances in which the relevance of a claimed inadequacy is so obvious that pointing out its omission is sufficient by itself to rebut plaintiffs' statistical case. *See Bazemore*, 106 S.Ct. at 3009 n.10; *Palmer v. Shultz*, 815 F.2d at 101.

This asserted shortcoming in the experienced pool analysis, however, biases the results in *defendants'* favor. Professor Haber testified that he purposely chose the lower (white) average in order to maximize the number of whites in the pool.[18] According to defendants themselves, "the lower the 'benchmark,' the lower the proportion of blacks in the 'experienced pool.'" Brief of Local 201 at 106. Given the unmanipulable nature of the figure of *actual* new members, the ultimate percentage of eligible workers selected for Union membership depends *entirely* on the number of individuals in the eligible pool: the more blacks in the pool of "likely examinees," the lower the percentage of black "actual examinees" as a proportion of black "likely examinees" will be, and vice versa. Because white non-members on average had worked fewer hours than black non-members, a lower benchmark increases the number of white "likely examinees" relative to the number of black "likely examinees." The respective percentages of "likely examinees" who became "actual examinees," it follows, are correspondingly lower for whites and higher for blacks. Thus, rather than demonstrating that the 2150 hour benchmark biases the results in favor of plaintiffs, defendants' analysis suggests exactly the opposite.

Defendants also argue that the failure to segregate the experienced pool by age (that is, to analyze separately the group over age 30 and the group under age 31) fatally skewed the results in favor of plaintiffs. Defendants maintain that there was no reason not to segregate by age when available data made it possible to do so; this failure is significant, they argue, because the respective paths to Union membership in the Apprenticeship and Training contexts were so different. Defendants maintain that in the under-31 group, blacks as a propor-

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[18] The average number of hours for the white examinees during the Open Period was 2150, the benchmark chosen. For blacks, the average was over 2800 hours. *See* Tr. F. 69.

tion of the total experienced pool constituted 24.8 percent (the black "availability rate"), while black participation in the Apprenticeship Program was 30.3 percent, a figure obviously greater than the black "availability rate." *See* Brief of Local 201 at 98. Similarly, in the over-30 pool, blacks constituted 75.8 percent of the experienced workers, with their participation rate in the Training Program at 96.2 percent, again a figure well above the black "availability rate." *Id.* Defendants maintain that the failure to segregate the experienced pool analysis by age therefore skewed the results in plaintiffs' favor.

This argument suffers from a fatal flaw. Defendants' analysis focuses on black *participation* in the Apprenticeship and Training programs, rather than black *completion* of the programs (i.e., achievement of Union membership). If one focuses on black participation as a whole—not segregating by age, the asserted flaw in plaintiffs' analysis—the results are also favorable to defendants. Thus, the failure to segregate by age had no independent demonstrable effect on the validity of the experienced pool analysis. This suggests that defendants' challenge to plaintiffs' statistical case is in fact an attack on the premises underlying the statistical model, to which we now turn.

3. *Defendants' Attack on the Premises of the Experienced Pool Analysis*

Defendants attack several fundamental aspects of the experienced pool analysis. Among their objections are: (1) that the concept of "access" to the exam relied on by plaintiffs is flawed; (2) that not all experienced rodmen, i.e., "likely examinees," were interested in becoming journeymen; (3) that no specific procedure within the Apprenticeship or Training Program was shown to be discriminatory; (4) that the Union cannot be forced to increase the size of its membership in order to achieve racial balance; and (5) most centrally, that the experi-

enced pool did not account for "minimum objective qualifications" of the trade because an educational prerequisite is, and always has been, uniformly required.

(a) *The "False" Concept of "Access"*

First, defendants argue that it is wrong to regard only those workers who *completed* one of the educational programs and took the exam as having "access" to the exam. Rather, they maintain, the proper definition of "access" to membership includes those who were *admitted* to either the Apprenticeship or Training programs. As defendants see it, the only "requirement" to gain access to Union membership is to secure admission to one of the two educational programs; no one "fails" or is otherwise forced out of either program, as evidenced by the fact that virtually all who finished their respective program passed the exam. To survive the educational component of either program, defendants maintain, all one needed to do, in effect, was show up for class. Therefore, the real source of disparity in minority membership, the argument goes, is the disproportionate number of minority *dropouts* from the Apprenticeship Program and, especially, the Training Program. According to defendants, those who chose not to complete one of the educational programs had no less access to Union membership than did their colleagues who diligently completed their particular programs.

If we accepted defendants' invitation to focus on the rate of *participation* in the educational programs, rather than the rate of *completion*, then plaintiffs' prima facie case would indeed disappear. Defendants are correct that the racial disparity in admissions to Union membership can be explained entirely by the disproportionate rate of minority dropouts from the educational programs.[19] In

[19] It is appropriate to observe at this juncture that the Training Program, as a Department of Labor-funded affirmative action

defendants' view, it follows that, inasmuch as there were no allegations of discrimination in the *administration* of the programs, the experienced pool analysis is of no relevance in determining the ability of minorities to gain Union membership.

With all respect, the Union's focus on participation in the educational programs misses plaintiffs' fundamental point. Plaintiffs challenge the very *existence* of a training program as a discriminatory barrier to Union membership. So viewed, the higher dropout rate for blacks obviously buttresses plaintiffs' case: *Absent rebuttal, the fact of disproportionately high minority dropouts demonstrates the effectiveness of the barrier to membership represented by Local 201's educational requirements, particularly the Training Program.* Defendants are thus fundamentally in error in grandly asserting that plaintiffs cannot "simply cite the requirement of training as the discriminatory practice at issue." Brief of Local 201 at 97 n.106. The requirement of "training" is precisely the issue. *See infra* Part IV.C.3.e.

(b) *The Assumption That All Experienced Workers Desired Union Membership*

Defendants contend, next, that the experienced pool analysis is inadequate because it assumes that all experienced workers desired to become Union members.

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program, was overwhelmingly comprised of minorities. It is thus hardly surprising that dropouts from the minority-dominated program were predominantly minorities. There were many more experienced non-members over age 30 than under that age; those individuals were overwhelmingly black. Combined dropouts from (as well as combined admissions to) both the Apprenticeship and Training programs would therefore tend to be dominated by the larger Training Program, and thus by minority workers. Moreover, apprentices had more incentive to stay in their program because during the early 1970s, unlike trainees, they paid an initiation fee and full Union dues.

According to defendants, the record demonstrates that experience does not necessarily make one a "likely examinee." During the early 1970's, permit workers and journeymen alike were fully employed. In those circumstances, there was little incentive for a rodman to undergo the considerable inconvenience (and expense) of becoming a Union member. Indeed, several of the named plaintiffs chose to forgo opportunities for training which would have led to Union membership. *See* Brief of Local 201 at 93. Defendants urge that the experienced pool analysis is therefore flawed by virtue of this unfounded assumption. To hold to the contrary, they maintain, would be to require the Union somehow to force workers to join the Union in order to achieve racial balance, a result that is indisuptably not required (and indeed forbidden) by Title VII. *See* Brief of Local 201 at 94.

We can safely assume that, for one reason or another, some experienced workers did not desire Union membership.[20] But it does not follow that the experienced pool analysis is thereby rendered inadequate, or that the Union is somehow being required to force workers to join in order to achieve racial balance. Rather, we believe defendants demand more than the law requires from plaintiffs' statistical case. As a theoretical matter, the experienced pool analysis is not undermined by the (partially) inaccurate assumption that experienced workers were "likely examinees." The reason is this: *There is no reason to assume that blacks were as a general matter*

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[20] Defendants point, plausibly, to two considerations that may reasonably have affected a prospective member's interest in entering the Union's ranks: (1) the mid-1970s represented a time of full employment for rodmen by virtue of the construction explosion occasioned by work on Washington's subway system; and (2) the abundance of available work created disincentives for Union membership, which was of marginal, if any, immediate utility during a time of full employment. They have not, however, pointed to any reasons why these considerations would operate more strongly on black workers than white.

less interested in Union membership than whites. Certainly, defendants have presented no persuasive arguments or evidence to the contrary. Indeed, during the Open Period, when blacks and whites had equal opportunity to take the exam, they did so in relatively equal proportions. Absent a showing that the demonstrated inadequacy in the experienced pool analysis biased the results in plaintiffs' favor—that is, that black nonmembers did not desire to be members in roughly equal numbers as white—defendants fail to undermine the prima facie case.

(c) *The Failure to Identify Specific Discriminatory Procedures, or to Demonstrate that Defendants' Conduct Caused the Racial Disparities*

Defendants next urge that plaintiffs failed to identify the specific test, procedure or practice alleged to have had a discriminatory impact, or (under a disparate treatment or section 1981 analysis) to demonstrate that discrimination was the Union's "standard operating procedure." *See* Brief of Local 201 at 94-96. Defendants argue that a prima facie case discrimination was therefore not made out. These arguments can be dealt with in short order.

Quite simply, defendants once again decline to recognize the thrust of plaintiffs' challenge. The "specific procedure" under challenge is the requirement of classroom training before experienced workers may qualify to enter the ranks of journeymen rodmen. That theory of the case fully satisfies defendants' obvious right to know precisely what is under challenge. And defendants have failed to explain why the asserted barrier of an absolute educational requirement, regardless of experience and ability, is somehow shielded from attack. With respect to the alleged failure to demonstrate that discrimination was the Union's "standard operating procedure," plaintiffs'

statistical proof, reaching the requisite showing of approximately two standard deviations, supplies an inference of discriminatory intent for the reasons set forth in Part IV.A.1. of this opinion.

Defendants counter that there has been no showing of a causal connection between the challenged practice and the alleged discriminatory result. According to defendants, "[t]he Court cannot indulge in the assumption that Defendants caused people to drop out of the apprentice or training programs." Brief of Local 201 at 96. Defendants argue that no evidence suggested, much less demonstrated, that the higher minority dropout rate from the two programs was attributable to any of their actions. Here too, defendants have missed a basic point, which we have already elucidated: in a case based on statistical proof, direct evidence of discrimination is unnecessary. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Segar v. Smith*, 738 F.2d 1249, 1277-79 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

Indeed, the entire notion of employing statistical proof is to eliminate non-discriminatory causes as likely explanations for racial disparities. In the present context, it seems to us that as a matter of logic there are four possible explanations to account for the failure of blacks to gain Union membership in equal proportions to whites: a) pure chance; b) blacks did not desire to join the Union in roughly equal numbers as whites; c) blacks failed the exam in greater percentages than whites; and d) the educational prerequisite discouraged blacks from taking the exam in greater proportion than whites. Possibility (a) was, of course, eliminated as part of plaintiffs' prima facie statistical case. Possibility (b) can readily be eliminated since, as discussed above, there is no reason to assume that blacks in general had less desire than whites to join the Union. (Indeed, as we saw above, the evidence as to the Open Period suggests ex-

actly the opposite). Possibility (c) is untrue as a matter of fact, as the parties agree. That being so, plaintiffs by their statistical proof established a prima facie case that possibility (d) provides the true explanation. Under settled principles, the burden thereupon shifted to defendants to demonstrate to the contrary. Defendants are therefore off the mark in arguing that plaintiffs have not shown causation. Contrary to defendants' protestations, the burden fell to them to show that some racially neutral explanation existed for why blacks were failing, disproportionately, to become Union members.

(d) *The Experienced Pool Analysis Would Require the Union to Maximize its Membership Ranks to Achieve a Racial Balance*

Defendants argue that the experienced pool analysis operate so as to penalize the Union for not maximizing its membership ranks to achieve racial balance. *See* Brief of Local 201 at 103-05. According to defendants, the largest portion of the experienced pool consisted of workers over age 30; this group also happened to be disproportionately black. Defendants reason that because the Training Program was an affirmative action program, and whites over age 30 therefore had less effective avenues to Union membership than did blacks, plaintiffs' complaint boils down to a quibble that greater numbers of *blacks over age 30* were not admitted to Union ranks. And, defendants continue, the only reason for admitting these more experienced workers would be to achieve a desired racial balance. According to defendants, Title VII does not require them to achieve a racially balanced membership.

To be sure, defendants are correct that unions have a legitimate, racially neutral interest in limiting the size of their memberships in accord with market demands. No one in this case has quarreled with the proposition that, at least insofar as the civil rights laws are con-

cerned, Local 201 should be permitted to continue to "determine[] its number of apprentice and trainee indentures based on available employment." Brief of Local 201 at 105.

But it is equally clear that Unions are not permitted to limit their rolls in a discriminatory manner. Plaintiffs do not claim, and we emphatically do not hold, that the Union's vice was in failing to open its doors to all experienced blacks over the age of 30.[21] Rather, we hold today only that the *means chosen* by the Union to achieve its legitimate end of limiting membership were, in the face of plaintiffs' proof, impermissibly discriminatory. The Union remains at liberty to employ a more stringent exam, or any other job-related system of qualifying workers for Union membership, so long as the result is not violative of the civil rights laws.

(e) *The Experienced Pool Analysis Did Not Account For Minimum Objective Qualifications*

Defendants' final challenge to the plaintiffs' prima facie case is fundamental in nature. It is well established that if a statistical model does not take into account the legitimate, objective qualifications for the jobs being analyzed, then it fails sufficiently to focus on an appropriate labor pool, and is therefore deficient in establishing a prima facie case. *See Palmer v. Schultz*, 815 F.2d 84, 91 n.6 (D.C. Cir. 1987); *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied*, 471 US. 1115 (1985) According to defendants, the experienced pool analysis, in assuming that experience alone can qualify one to be a journeyman, fails to account for minimum objective qualifications for becoming a Union mem-

[21] We do not quarrel with the Union's point that blacks over 30 had greater access to Union membership than whites of the same age. This too is irrelevant, though we observe that much of the reason for this state of affairs is that far more non-members over age 30 were black.

ber. Defendants argue that plaintiffs' statistical proof therefore failed to establish a prima facie case.

At first blush, defendants' argument appears formidable. A basic premise of the experienced pool analysis, and indeed of plaintiffs' entire case, is that the Apprenticeship and Training programs are unnecessary for some workers, namely those sufficiently experienced to pass the rodman exam without classroom training. But it is undisputed that the rodman trade has historically been apprenticeable; moreover, it stands to reason that on-the-job experience alone may not necessarily teach all that a fully qualified rodman should know. Nonetheless, although there was conflicting testimony at trial, the Disttrict Court was unsatisfied that the Training Program classes to which plaintiffs were subjected were in fact substantive in nature or that workers learned through attendance at such classes.[22]

But there is another factor as well. During the 1971 Open Period, *the Union admitted workers to the exam based entirely on experience at the trade. See* Tr. 1484 (vol. l), 1563-64 (vol. i) (testimony of Mr. Grigsby, Local 201's Business Manager). All workers who were not journeymen members with at least two years' experience—the approximate length of the apprenticeship period—were invited by the Union to take the exam during that period. It was by this very amount of experience, on which the Union itself had relied in the past, that plaintiffs employed as the minimum necessary to qualify

[22] In this regard, we are frankly troubled by the District Court's casual intimations to the contrary in view of the record. *See* Tr. F. 14, 103-05. The weight of the evidence, which the District Court chose not to treat specifically, clearly was that the Training Program classes were substantive. *See, e.g.*, Tr. 1514-15 (volume h) (Testimony of Mr. Grigsby, Local 201's Business Manager); Tr. 1830-43 (vol. k) (Testimony of Mr. Masler, an instructor in the Training Program). Unfortunately, the trial court failed to address the evidence, and we are left without the benefit of the District Court's specific views in this respect.

for the exam in constructing the statistical case. In our view, the existence of the Open Period points to the conclusion that the Union itself has not viewed an educational requirement as an absolute, minimum objective qualification for becoming a journeyman rodman.

We do not doubt that the Union could reasonably conclude that apprenticeship or training is preferable to experience alone in identifying and choosing journeymen rodmen. As we have said earlier, absent discriminatory practices, the Union remains free to utilize any such job-related vehicles. But the Union has, in effect, hoisted itself on its own petard, having chosen in the Open Period to treat experience alone as sufficient for admission to the journeyman exam. It therefore cannot now be heard to complain that classroom training was, all along, absolutely indispensable.

Recognizing the vulnerability posed by the Open Period, defendants respond that that episode was an isolated, short-term event, a one-time practice imposed by the International. Moreover, they protest, the exam utilized during that brief period was different from the normal journeyman's exam, with the concomitant result that workers failed the exam in high numbers. We have no quarrel with these asserted facts, but we disagree with the Union as to their significance. In our view, *the Open Period establishes that experience can qualify one to be a journeyman rodman, and, not incidentally, that the Union is capable of devising an exam that screens out insufficiently competent applicants for journeyman status.*

We hasten to add that there is nothing remarkable in our rejecting defendants' argument with respect to minimum objective qualifications. We in no wise disparage the legitimate qualifications for becoming a journeyman rodman, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); nor do we in any manner suggest that the

Union is required to admit unqualified individuals, *see Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986). Under our analysis, the Union remains free, among other things, to (1) require significant rodman experience before an applicant may be admitted to the journeyman exam, (2) offer (cured of discrimination against experienced workers) both the Apprenticeship and Training programs, and (3) devise a more exacting or thorough exam for rodmen who eschew classroom training to assure that skills (e.g., reading blueprints) learned in the classroom have been learned on the job (so long, of course, as any such "stepped-up" exam satisfies the bedrock requirements of job-relatedness).

D. *Defendants' Rubuttal Case*

Defendants' various objections to plaintiffs' statistical case are best considered as an effort to undermine the validity of the experienced pool analysis. The record is, indeed, devoid of *any* affirmative rebuttal case—that is, seeking to prove by their own evidence that admission to Union ranks was not racially disproportionate. We therefore conclude, in light of our earlier analysis, that plaintiffs' prima facie case went unrebuttted. The Union is thus liable to those class members who were experienced workers, but were delayed entry to Union ranks by the particular educational prerequisite affecting them from the end of the Open Period until the filing of suit on October 21, 1975.[23]

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[23] This time-frame theoretically includes some workers who were experienced (and therefore delayed membership by virtue of the Apprenticeship Program) prior to the institution of the Training Program in September 1972. It certainly includes workers who were experienced, yet were deterred by the barrier of Apprenticeship or Training after September 1972.

E. *Plaintiffs' Failure to Show a Pattern of Discrimination*

The District Court stated broadly that "plaintiffs . . . demonstrated that, since 1967, all of the rules used by the defendants for selecting examinees have discriminatorily prevented blacks from gaining membership in [the Union]," Tr. F. 82, and that these "discriminatory actions against plaintiffs and the class are continuing violations of Title VII and section 1981." Trial Conclusion of Law ("Tr. C.") 22; *see* also Tr. C. 21 ("The evidence presented demonstrates persistent, pervasive and intentional discrimination against black rodmen.") The District Court thus found defendants liable for all selection procedures used since 1967, under a theory of continuing violation or pervasive pattern of discrimination. *See Milton v. Weinberger*, 645 F.2d 1070, 1074-75 (D.C. Cir. 1981) (referring to continuing violations as "series of related cast, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the stautory period" (quotation and citations omitted)); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Valentino v. United States Postal Serv.*, 674 F.2d 56, 65-66 (D.C. Cir. 1982).

Plaintiffs' theory is that, over many years, the Union erected a series of barriers which, in succession, accomplished the discriminatory purpose of keeping blacks out of the Union. In plaintffs' view, the various selection systems chosen by the Union, taken together, reflect an insidious pattern: "deny access to an exam, allow access to an exam but fail blacks disproportionately, then deny access again." Brief of Appellees at 29. Plaintiffs hope to connect the violations which are clearly within the limitations period—the delay inherent in requiring experienced workers to undergo apprenticeship or training —to the violations we have held to be outside the limitations period—the allegedly discriminatory Open Period

exam and the allegedly discriminatory high school diploma requirement. The District Court agreed with plaintiffs and held defendants liable for all the alleged violations.

Under settled principles, the appropriate analysis with respect to continuing violations focuses on whether the current violations were taken pursuant to the same employment policy as the actions sought to be challenged outside the normally applicable limitations period. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). The inquiry is thus whether the various admission procedures since 1967, taken together, constituted a single policy to discriminate. For reasons which we will explain below, we hold that they do not. Based on the entire record, we are unpersuaded that the totality of the Union's selection procedures constitute a "pattern of discrimination," *McKenzie v. Sawyer*, 684 F.2d 73 (D.C. Cir. 1982), or "a chain of connected events," *Bethel v. Jefferson*, 589 F.2d 631, 636 (D.C. Cir. 1978), sufficient to justify relaxing the normal limitations periods for challenging those practices. Indeed, plaintiffs have introduced no evidence connecting the various procedures so as to establish an ongoing policy and plan to discriminate.

First and foremost, the Open Period procedure marked a sharp break in the Union's traditional admission practices. Suddenly, any individual with the requisite level of experience was permitted access to the exam. Thereafter, the new system instituted at the conclusion of the Open Period likewise broke any connection to prior selection practices. It manifestly represented a break from the Open Period. We cannot fail to note that the Training Program, instituted after the Open Period, was a federally funded, approved, and supervised, affirmative action program. The dual Apprenticeship/Training sys-

tem was thus an entirely novel system, unconnected to the Open Period procedure or to the earlier Executive Board/ Apprenticeship system. Absent any evidence of intent to exclude blacks over time in the fashion plaintiffs hypotheize, the various systems are more naturally and rea-reasonably viewed as separate. There certainly has been no showing that the Union long ago conceived a plan to exclude blacks by whatever means seemed efficacious as time progressed. Accordingly, the District Court's findings to the contrary are reversed.

V. Plaintiffs' Allegations of Retaliatory Conduct Under Title VII

The District Court found that the defendants "or other agents" not further identified unlawfully retaliated against plaintiffs Jackson, Kirklan, Berger, Lewis, and Bellamy in violation of section 704(a) of Title VII, which makes it

> an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or rertaining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

To establish a prima facie case under section 704(a), a plaintiff must show: 1) that he or she engaged in activity protected by the statute; 2) that the employer,

joint labor-management committee, or labor organization engaged in conduct having an adverse impact on the plaintiff; and 3) that the adverse action was causally related to the plaintiff's exercise of protected rights. *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985); *McKenna v. Weinberger*, 729 F.2d 788, 790 (D.C. Cir. 1984). Once that burden has been met, the defendant may introduce rebuttal evidence providing legitimate, nonretaliatory reasons for its conduct. The plaintiff may then attempt to show that the defendant's asserted justification is "merely a 'pretext' covering up unlawful retaliation through the guise of innocent business planning." *Williams v. Boorstin*, 663 F.2d 109, 116 (D.C. Cir. 1980). The evidence presented by the parties may at this point suggest that the reasons for the defendant's conduct are mixed, consisting of both retaliatory and legitimate factors. For that reason, this circuit has adopted a "but for" test of causation: "If the plaintiff has made a showing of 'pretext,' the defendant . . . must then demonstrate by clear and convincing evidence that the plaintiff would have [been subject to the defendant's actions] anyway absent retaliation for the plaintiff's participation in protected conduct." *Id.* at 117.

The District Court held that each of the plaintiffs had established a prima facie case of retaliation. Tr. C. 29. In addition to specific findings relating the adversity each of the plaintiffs had suffered, the court made two additional, but very general, findings. First, the court found that "[t]here is overwhelming evidence that defendants and their agents knew of plaintiffs' participation in this suit or in otherwise protected conduct." Tr. C. 28. Second, the court rejected the unspecified justifications the defendants had offered, apparently regarding them as pretextual. Tr. C. 29. For reasons we discuss below, we find that with one exception the District Court's findings of retaliation are clearly erroneous.

A. *Plaintiffs Berger and Lewis*

The court's findings respecting plaintiffs Berger and Lewis share common features; in both instances, the District Court found that the plaintiffs had been subjected to oral threats after they participated in this lawsuit. The court found that "Berger heard Tommy Gilmer, then business agent for Local 201, state at a union membership meeting . . . that he was going to make it hard on those who filed this suit." Tr. F. 113. The court also found that Gilmer threatened to withhold from Lewis an application for the Training Program until Lewis agreed to drop his charges of discrimination. Tr. F. 114. In neither case, however, did the District Court find that the "threat" was carried forward.

In the absence of a finding that the plaintiff has suffered adverse action, a retaliation claims fails as a matter of law. *Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985). The District Court made no specific findings that Berger or Lewis were subject to adverse treatment, and we cannot agree that Gilmer's statements, standing alone, can reasonably be viewed as "veiled threats and harassment" amounting to "classic examples of 'retaliation.'" Tr. C. 27. Our review of the record, in fact, reveals that Jackson himself testified that Gilmer did *not* threaten to withhold the Training Program application from him, but merely asked Lewis if he would drop the charges of discrimination once he was accepted into the program.[24] Similarly, Gilmer's statement that "he was going to make it hard" on the plaintiffs, though probative of retaliatory animus, had no effect itself on Berger, and was not put into effect

[24] Lewis testified:

Q: So [Gilmer] didn't tell you that you had to drop [the charges] in order to get in the program.

A: No, he asked me was I willing to drop the charges.

Tr. at 469.

through any action against Berger; it can best be characterized as "ill-advised but essentially harmless." *Reese v. Batesville Casket Co.*, 25 Fair Empl. Prac. Cas. (BNA) 1472, 1477 (D.D.C. 1981).

Because the District Court's findings lack an essential ingredient of a retaliation claim, they are insufficient to support its judgment against the defendants. We recognize, however, that repeated threats against individuals in response to their exercise of protected rights may amount to harassment sufficient to establish a claim of retaliation. *See Rogers v. McCall*, 488 F. Supp. 689, 697 (D.D.C. 1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 554 (2d ed. 1983). For that reason we have reviewed the record with particular care for any evidence of repeated threats or other individualized harm to either Berger or Lewis that can fairly be regarded as retaliatory. *See Reese*, 25 Fair Empl. Prac. Cas. at 1477. That search, however, has been fruitless.[25] The judgment of the District Court concluding that plaintiffs Berger and Lewis had suffered unlawful retaliation at the hands of appellants is, therefore, reversed.

B. *Plaintiff Jackson*

The District Court found that plaintiff Jackson "was laid off in January 1975, after charges of discrimination had been filed with the [EEOC], and was told by the superintendent of the job site that he had orders from [a former Local 201 official] to fire him." Tr. F. 111. Jackson's testimony is the only evidence of the Union's

[25] We do note that Berger testified that after Gilmer stated that he "was going to make it hard" on the plaintiffs, Berger worked only a total of four days in the sixteen-month period preceding trial. Berger's testimony was rebutted by pension records indicating that he worked over 1200 hours in this period, more than the average journeyman. We must assume that the District Court credited the rebuttal evidence since there is no finding that Berger suffered from retaliation in being denied referrals.

(or any other defendant's) participation in his layoff, and the portion of his testimony that makes this connection was, upon objection, excluded from the record by the District Court. Tr. at 249-50. The only record evidence bearing on the circumstances surrounding Jackson's layoff and the involvement of the defendants therein is the testimony of the same superintendent whom Jackson alleges made the statements implicating Local 201. The superintendent—himself a member of the plaintiff class—testified that Local 201 was *not* involved in Jackson's layoff. Tr. at 2543. Because there is no competent evidence linking any of the defendants to Jackson's layoff, the District Court's finding is clearly erroneous.

Even if we were to accept Jackson's proffered testimony, the District Court's finding would remain unsound. Jackson testified that the reason for his layoff was because he was black, Tr. at 250, and because the Union "found out [he] was making $24,000 a year [and] that that is too much for a permit man, especially [a] black [one]." *Id.* at 279. Clearly, Jackson does not view himself as a victim of retaliatory conduct; in fact, nowhere in his testimony is the charged filed with the EEOC mentioned, much less connected with his layoff.

Read in the light most favorable to the plaintiff, Jackson's testimony at most suggests that he was discriminated against on the basis of race. It is simply irrelevant to a charge of *retaliation*.[26]

It is apparent that the District Court confused the standards applicable to claims of retaliation with the

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[26] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799-800 (1973) (emphasis added):

> section [§ 704(a)] relates *solely* to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while [section 703(a)(1) of Title VII] deals with the broader and centrally important question under the Act of whether, *for any reason*, a racially discriminatory employment decision has been made.

standards applicable to claims of racial discrimination. Whatever merit Jackson's claim may have under Title VII's provisions prohibiting racial discrimination in employment, that is not the claim before us. The court's conclusion that Jackson was laid off in retaliation for the exercise of protected statutory rights is reversed.

C. *Plaintiff Kirkland*

The District Court found that plaintiff Kirkland had been laid off in retaliation for participating in this lawsuit. Tr. F. 112. The layoff occurred approximately one week after a conversation between Kirkland and his supervisor, Kay Coda, in which Coda questioned Kirkland about the lawsuit. Although Kirkland's testimony thus establishes the essential elements of a retaliation claim against his employer—*i.e.*, engaging in protected activity, an adverse employment action, and knowledge of the protected activity on the part of the employer—that employer was not named as a defendant in this case.

Our review of the record indicates that there is no evidence linking Kirkland's layoff with any of the named defendants in this case; nor does the sequence of events leading up to the layoff provide a basis from which an inference could be drawn that the hands of any of the defendants were lent in support of the employer's actions. We also discern no basis in the record for treating Kirkland's employer as an "agent" for any or all of the defendants.

The plaintiffs argue that Local 201 may nonetheless be held liable for retaliation because it has an affirmative duty to challenge employer discrimination against union members and failed to do so in this case. It is true that the Supreme Court has recently held that a union that ignores or refuses to process its members' grievances against employers for alleged racial discrimination may be held liable under Title VII and section 1981. *Goodman*

v. Lukens Steel Co., 107 S. Ct. 2617, 2625 (1987). That decision, however, provides no support for the argument here advanced by the plaintiffs. The District Court found that the alleged retaliatory act against Kirkland consisted in the layoff, not in the defendants' failure affirmatively to oppose the employer's discriminatory conduct. Tr. C. 27. Thus, whether any or all of the defendants had an affirmative duty to take action against Kirkland's employer, is an issue that was neither argued before, nor addressed by, the District Court.[27] We therefore hold that the District Court erred in finding the defendants liable for retaliation against Kirkland.

D. *Plaintiff Bellamy.*

In a letter dated November 11, 1974, plaintiff Bellamy complained to the International about the Union's discriminatory practices. Shortly thereafter, he was laid off from employment by Y & M Steel.[28] When he next reported to Local 201's referral hall, a Union official confronted Bellamy about the letter, the two men "ex-

[27] Even if the argument pressed by the plaintiffs were properly before this court, *Goodman* would not be controlling. There is no evidence that Kirkland appealed to the defendants for relief through grievance or other available procedures. In *Goodman*, the Court specifically declined to address the question whether "mere passivity" in the face of employer discrimination against union members is sufficient to establish a claim under Title VII or section 1981 against the union representing those employees. *Goodman*, 107 S. Ct. at 2623. Even "mere passivity," however, implies that the defendants were at least aware of the employer's discriminatory practice. Although we may assume that Local 201 was aware of Kirkland's layoff, we cannot first assume, in the absence of any evidence, that any of the defendants knew, should have known, suspected, or should have suspected that the layoff was made for other than legitimate business reasons.

[28] Although the plaintiffs appear to argue that the layoff itself was retaliatory, *see* Brief for Appellees at 83, this claim is not supported by the District Court's findings; we therefore decline to address this issue.

changed some words," and the official threatend to pass over Bellamy in making referrals. Tr. at 51. In fact, however, Bellamy obtained employment through the Union the very next day, but only at reduced wages. The Union explained the cut in pay to Bellamy as an incident of his participation in the Training Program. The District Court found that this reduction in wages constituted unlawful retaliation. Tr. F. 115.

Having reviewed the record, we conclude that the District Court's finding is not clearly erroneous. Bellamy's testimony clearly established a prima facie case of retaliation. We also believe that the District Court could reasonably regard the defendants' asserted justifications as merely pretextual.

The defendants attempt to justify the wage cut under the terms of an agreement Bellamy signed when he entered the Training Program. That agreement—an application form—provided that trainees may be referred to employers at wages below those commanded by journeyman rodmen. Tr. at 2698-2701. Bellamy entered the Training Program sometime in 1973, long before he was laid off. From the time he entered the program until shortly after he wrote to the International, he received full journeyman wages. Thus, while the defendants have presented a potentially legitimate reason for the wage reduction, that reason is not sufficient to explain the timing of the pay cut, nor does it explain why other trainees continued to be referred by the Union at journeyman rates. The defendants' proffered justification therefore does not satisfy the "clear and convincing" standard under this circuit's "but for" test of causation. *See Williams*, 663 F.2d at 117. We therefore affirm the District Court's judgment that plaintiff Bellamy was subjected to retaliation in violation of Title VII.

VI. Liability of the International

We have earlier upheld the District Court's conclusion that the educational prerequisite—*i.e.*, completion of the Apprenticeship or Training Program—as applied to experienced rodmen who wanted to become members of Local 201 had a disproportionate impact on blacks in violations of Title VII and section 1981. *Supra* Part IV. We have now upheld the court's finding that plaintiff Bellamy was subjected to unlawful retaliation in the form of reduced wages. Without more, however, these conclusions do not implicate the International. The circumstances under which an international union may be held liable for discriminatory practices of an affiliated local union, or for retaliatory conduct occurring at the local level, is a question of first impression in this circuit. As we explain more fully below, we have little difficulty concluding that the International's involvement in the membership practices of Local 201 was sufficiently extensive to subject it to liability under Title VII and section 1981. By contrast, we are unable to discern any basis for subjecting the International to liability for Bellamy's retaliatory wage reduction.

A. *Legal Background*

It has long been established that a collective entity, including a labor organization, "may only be held responsible for the authorized or ratified actions of its officers and agents." *Shimman v. Frank*, 625 F.2d 80, 95 (6th Cir. 1980) (quoting *North American Coal Co. v. United Mine Workers*, 497 F.2d 459, 466-67 (6th Cir. 1974)). This standard of liability extends generally to situations in which an international union is sued for the conduct of its affiliated local. More specifically, in Section 301(e) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 185(e) (1982), which governs suits for violations of contracts between an employer and a union or between two labor organizations, Congress "adopted a

common-law agency test" to govern the liability of an international for the acts of its affiliated locals. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217 (1979); *see also Shimman*, 625 F.2d at 97-99. In *Carbon Fuel*, the Supreme Court held that in order to hold an international union liable in damages for "wildcat" strikes engaged in by its locals, a plaintiff must adduce specific evidence that the international "instigated, supported, ratified, or encouraged" those actions, *id.* at 218, or "that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 217 (quoting *Coronado Coal Co. v. Mine Workers*, 268 U.S. 295, 304 (1925)); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 735-42 (1966).

The plaintiffs argue that the cases in which common law agency principles have been invoked to determine whether an international should be held to account for the activities of a local "have nothing to do with Title VII or section 1981." Brief of Appellees at 103. True enough. The question is therefore whether any different standard for holding the International liable obtains in this arguably different context. The plaintiffs claim that these civil rights statutes create an "affirmative duty" in the International to eliminate discrimination, such that the International may be held responsible for the discriminatory acts of its local if the plaintiffs demonstrate merely a "sufficient connection" between the International and the discriminatory practices in issue.

The primary authority upon which the plaintiffs rely is the Fifth Circuit's decision in *Myers v. Gilman Paper Corp.*, 544 F.2d 837, *modified on other grounds*, 556 F.2d 758 (5th Cir.), *cert. denied*, 434 U.S. 801 (1977), which pre-dates the Supreme Court's decision in *Carbon Fuel*. In *Myers*, the court found an international liable for the discriminatory effects of a collective bargaining agreement administered by one of its locals, despite the international's claim that there was no "specific proof that

it caused, participated in, or ratified its local's acts or omissions." *Id.* at 850. The court concluded that a "sufficient connection" existed between the international and the discriminatory practices by virtue of the "close relationship" between the international and the local:

> Here the international established a close relationship with its locals, under which the international would generally provide advisors who would review and often comment upon the local's bargaining position. An additional aspect of the relationship was the international's requirement that locals submit contracts to it for its approval.

Id. at 851.

While the plaintiffs are certainly correct in arguing that § 301 of the LMRA does not directly control this case, we are convinced that the common-law agency principles underlying it provide the appropriate analytical framework as well under Title VII and section 1981. Two reasons support this conclusion. First, the Court's decision in *Coronado Coal*, which predated the enactment of the original National Labor Relations Act, suggests that where Congress has not otherwise declared the standards governing vicarious liability, a union's liability for the acts of another is to be determined under common-law agency principles. Second, when Congress adopted a common-law agency standard in the LMRA, it recognized that a local union *may* in practice enjoy a considerable degree of actual autonomy, despite its formal dependence upon the parent international for its continued existence. *See also Boss v. International Bhd. of Boilermakers*, 567 F. Supp. 845, 847 (N.D.N.Y.), *aff'd*, 742 F.2d 146 (2d Cir. 1983), *cert. denied*, 469 U.S. 816 (1984). That implicit premise would, of course, apply equally in the context of Title VII and section 1981. Against this background, we think that if Congress intended that international unions be held liable for the failings of their locals with regard to civil rights

under a special standard, it would have given some indication to that effect.

Moreover, having studied the Fifth Circuit's decision in *Myers*, we do not think that the "sufficient connection" test was structured or given content by principles meaningfully distinguishable from common-law agency principles. In *Myers*, the court found not only that the international and its local had a general "close relationship," but more important, that the international had *in fact* "provided an 'advisor' to the local in its negotiations and . . . approved the resultant collective bargaining agreement." *Id.* at 851. Having thus participated in and approved a practice of the local that was later found to be discriminatory in effect, the international would surely have been held accountable for the local's conduct under the agency standard of the common law, as articulated in *Carbon Fuel*. We do not believe, therefore, that the "sufficient connection" test, as applied in *Myers*, supports a less stringent standard of vicarious liability under Title VII and section 1981 than the common-law agency standard that Congress and the Supreme Court have determined is applicable in other contexts.

Other Title VII and section 1981 cases in which the "sufficient connection" test has been applied are of no different import; indeed, we believe that these cases, while speaking of an international union's "affirmative duty," confirm our holding that common-law agency principles apply to unions in the civil rights context.

In *Sinyard v. Foote & Davis Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978), the Fifth Circuit noted that, "[a]s a general proposition . . . international labor unions must bear a heavy responsibility in giving effect to the remedial provisions of . . . Title VII," but cautioned that the imposition of any affirmative duty depends "on the relationship between the international and the local and the amount and type of involvement which the international has" with the discriminatory practice

under challenge. *Id.* Citing *Myers*, the court further noted that, "[t]he precedents on which appellants rely do not sanction our blanket imposition of an affirmative duty on international unions to police their locals to insure nondiscrimination—an undertaking which on occasion may be beyond their capacity." *Id.* And although the court endorsed the "sufficient connection" formulation, it applied common-law agency principles to exonerate the international. Thus, the court noted that "the International had not caused or participated in and did not approve the condition complained of." *Id.* at 947; *see Howard v. International Moulders & Allied Workers Union*, 779 F.2d 1546, 1548 (11th Cir.), *cert. denied*, 106 S. Ct. 2902 (1986) (international liable where its representative "worked closely" with local negotiators, resulting in discriminatory bargaining agreement); *accord Sagers v. Yellow Freight Sys.*, 529 F.2d 721, 737-38 (5th Cir. 1976); *see also Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1360 (9th Cir. 1975) (international liable where it negotiated and signed discriminatory collective bargaining agreement).

That common-law agency principles apply equally to determine an international union's liability under the civil rights laws as they do in other contexts is also the unavoidable implication of the Supreme Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). In that case, the Court declined to impose liability under section 1981 on an employers association for the discriminatory manner in which a union had implemented a collective bargaining agreement that the association had negotiated. The district court had found that the association, by agreeing to the referral system the union administered at its hiring hall, had "delegated" authority to the union to select workers for the association's employers; it was therefore charged with the " 'duty to see that discrimination does not take place in the selection of one's workforce,' regardless of where

the discrimination occurs." *Id.* at 392 (quoting *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 412 (E.D. Pa. 1978)).

The Supreme Court, however, found this theory "flawed on its own terms," declining to sanction the "imposition of liability on [the employers association] based on the acts of a party with whom it had no agency or employment relationship." *Id.* Accordingly, we see no principled reason for dispensing with the requirement of an agency relationship between the International and its local here. Instead, we believe *General Building Contractors* underscores the need, under Title VII and section 1981, to base one party's liability for the acts of another party on something more than the abstract and unbounded premise that the entities regulated by those laws have an "affirmative duty" to end discrimination. unbounded premise that the entities regulated by those laws have an "affirmative duty" to end discrimination. That something more is to be found in accordance with longstanding agency principles, the "core" of which involves a " 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control.' " *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958)).[29]

We do not doubt that a labor organization may in some circumstances have an obligation actively to oppose discriminatory conduct on the part of individuals or entities with which it has no agency relationship, *see Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2625 (1987); *Macklin v. Spector Freight Sys.*, 478 F.2d 979, 898 (D.C. Cir. 1973), and our discussion above should not be read as indicating anything to the contrary. Neither *Goodman*

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[29] The traditional indicia of an agency relationship include "(1) consent; (2) fiduciary duty; (3) absence of gain or risk to the agent; and (4) control by the principal." *Boss*, 567 F.Supp. at 847 n.1 (quoting H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP 11 (1979)).

nor any other case, however, suggests that a union's failure to act in opposition to discriminatory practices of an organization with which it has no agency relationship renders it vicariously liable for that organization's discriminatory practices; rather, the point of those cases is that the union's failure to act may be an independent basis for liability under Title VII and section 1981.[30] In this case, therefore, the concerns underlying *Goodman* and *Macklin*, and the question whether the International has breached an affirmative duty to oppose the discriminatory practices of Local 201, are inapposite. The plaintiffs did not argue before the district court, and do not argue before this court, that they were discriminated against by the International's failure to act, in breach of an affirmative duty; rather, they argue that the International is vicariously liable for the discriminatory conduct of Local 201. Thus, breach of an affirmative duty is not the theory against which the evidence in this case must be measured. The International's liability depends upon the existence of an agency relationship between the International and local 201.

While we believe that an agency relationship between the International and Local 201 with respect to the particular discriminatory practices in issue is both a necessary and a sufficient basis for holding the International liable under a theory of disparate impact under Title

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[30] Where a union's failure to act violates Title VII or section 1981, the discriminatory practices of the organization that the union failed to oppose may nonetheless weigh heavily in fashioning appropriate relief. If those discriminatory practices would not have occurred but for the union's failure to act, the union may be required to redress the injuries sustained as a result of those practices. It may remain open to the union, however, to demonstrate that even if it had acted, and satisfied its affirmative duty, the other organization's practices would not have been altered and the injuries would not have been prevented or abated. We express no opinion on whether such a showing would be sufficient to relieve a union of responsibility for remedying such injuries.

VII, the same conclusion does not follow *a fortiori* with respect to the plaintiffs' claims under section 1981. This is because liability can be established without a showing of discriminatory intent under Title VII but not under section 1981. *Goodman*, 107 S. Ct. at 2622; *General Building Contractors*, 458 U.S. at 391. Thus, we must further determine whether, under section 1981, an agency relationship between the International and Local 201 is sufficient to impute from the local to the International the requisite discriminatory intent.

In *General Building Contractors*, the Court assumed, without deciding, that an organization may be liable under section 1981 for acts of intentional discrimination perpetrated by its agents. *See id.* at 395. Cases in our sister circuits provide no more guidance on the question. In *Myers*, for example, the court made no distinction between Title VII and section 1981, apparently, but only apparently, thereby deciding that the "sufficient connection" test applies equally to both. *Accord Howard*, 779 F.2d at 1548.

The implication of the Supreme Court's decisions in *Carbon Fuel* and *Coronado Coal*, however, is instructive: in the absence of an explicit congressional directive to the contrary, common-law agency principles govern an international's liability for the unlawful actions of its locals. Applying those principles under section 1981, we find that at common law a principal may be held liable for the intentional torts of its agent if the agent's conduct its within the scope of his agency and "if, with knowledge of the conditions, [the principal] intends the conduct, or if he intends its consequences. . . ." RESTATEMENT (SECOND) OF AGENCY § 212 (1958); *see id.* at § 216. Thus, we hold that an international union may be liable under section 1981 if, with knowledge of the surrounding circumstances, it authorizes, ratifies, or approves a local's actions the effects of which are sufficient to establish a claim of intentional discrimination against the local.

With these principles in mind, we turn to the facts that we believe do establish that the International is liable for the central discriminatory conduct in this case.

B. *International's Liability for the Educational Prerequisite to the Journeyman Examination*

In holding the International liable in this case, the district court relied extensively on provisions in the International's Constitution, finding that these provisions "establish[] the pervasive authority of the International over the affairs of its affiliated local unions such as Local 201. . . . In a word, the Constitution identifies and treats affiliated local unions as 'subordinate bodies.'" Tr. F. 116. As we interpret this finding, the District Court believed that, for purposes relevant here, an agency relationship between the International and Local 201 could be established by merely looking to those terms of the International's Constitution that govern its relations with its locals.

The terms of an international's constitution can, undoubtedly, provide some evidence of such an agency relationship. *See Shimman*, 625 F.2d at 97; *Boss*, 567 F. Supp. at 847; *see also Local Union 984 v. Humko Co.*, 287 F.2d 231, 241-42 (6th Cir. 1961); *cert. denied*, 366 U.S. 962 (1961); *International Bhd. of Teamsters v. United States*, 275 F.2d 610, 612 (4th Cir. 1960), *cert. denied*, 362 U.S. 975 (1961). To the extent that provisions of the constitution deal specifically with the practices found to be discriminatory, moreover, they may be sufficient in themselves to raise an inference that the local is its agent. In many situations, however, an international's constitution will point a misleading picture of the actual relatonship it has with its locals. A local that is nominally semi-autonomous may actually be subservient. Alternatively, "a local union may remain autonomous and independent notwithstanding the fact that the International retains a degree of supervisory authority."

Boss, 567 F. Supp. at 847 (citing *Baldwin v. Poughkeepsie Newspapers, Inc.*, 268 F.2d 871 (7th Cir. 1958), *cert. denied*, 361 U.S. 869 (1959)).

For this reason, an agency relationship cannot simply be presumed rather than proved; "the diverse situations possible in the varied relationship between parent and local unions make individual examination of the facts, rather than a mechanical application of assumptions, a vital necessity." *Sinyard*, 577 F.2d at 947. In that examination, "what should matter is not so much the International's theoretical control over the local as the nature and extent of actual control." *Shimman*, 625 F.2d at 98 n. 36 (citing *Harnschfeger Corp. v. Sheet Metal Workers Int'l Ass'n*, 436 F.2d 351 (6th Cir. 1970)); *see also Sinyard*, 577 F.2d at 946 (declining to find a "sufficient connection" between an international and its local on the basis of international constitution providing international with "full power" to regulate its locals).

In this case, the International's Constitution indicates that the International had an interest in and potentially a substantial involvement with Local 201's membership practices. It provides the International with authority to oversee its locals' membership practices, stating that "[a] copy of every candidate's application for membership [in an affiliated local] shall be sent to Headquarters for approval. . . If a candidate is rejected, the application of such rejected candidate with the reason or reasons for rejection must be sent to Headquarters." Constitution of the International Ass'n of Bridge, Structural and Ornamental Iron Workers, Art XXI, § 2. As is usual, membership in the International is ordinarily automatic for anyone admitted to membership in an affiliated local. The International also receives a portion of the initiation fees and monthly dues that each member is responsible for paying to a local.

The Constitution does not, however, explicitly require, or authorize locals to require, applications for member-

ship to complete a Union-supervised educational program. Instead, the Constitution merely requires that, to be admitted to membership, an applicant "must be a practical workman versed in the duties of some branch of the trade . . . , of good moral character and competent to demand standard wages." *Id.* at Art. II, § 2. Thus, even if we were inclined to give considerable weight to the Constitution standing alone, we would not be compelled to conclude that the International "authorized," much less directed, the discriminatory practices of Local 201.

Looking beyond the terms of the International's Constitution, however, we find that the International was involved with the membership practices of Local 201 to such an extent that the District Court could infer that the local is the agent of the International with respect to the practices at issue here.

First, it is clear that the International believes, and indeed continues to argue, that the rodman trade is an apprenticeable one, requiring extensive classroom training. *See* Brief of Appellant International at 35-38. The International has thus at all times endorsed the general principle that there should be an educational prerequisite for membership. Second, and more specifically, it is reasonably clear that the International was fully aware of Local 201's membership policies. According to undisputed record evidence, the International had, on at least one occasion prior to the Open Period, met with Local 201 about membership practices and "discussed at length the reasons why the local should adopt a standard procedure for the acceptance of non-members as well as why non-members should be accepted." Tr. F. 130.

Most particularly, the facts could reasonably be viewed by the District Court as establishing that the educational requirement was a valve regulating access to union membership, which, to a considerable degree was controlled by the International. Since 1971, there has been only one short-lived departure—the "Open Period"—from the re-

quirement that applicants complete a Union-supervised educational program. The Open Period, during which rodmen having two or more years of experience were allowed to take a special journeyman examination without completing an educational program, was the creation of the International. The local implemented it only on the express instructions of the International, Tr. F. 133, and then only to prevent "future litigation, such as occurred in [other locals.]" TR. F. 132. After the Open Period ended in June 1971, the International developed and endorsed the Training Program as a replacement for the Open Period's reliance solely on an examination in admitting experienced rodmen. International President Lyons testified that one of the primary reasons for developing the Training Program was to avoid "diluting" the Apprenticeship Program or creating "a bunch of second-class ironworkers." Tr. at 3290. With the Training Program, the International "acted to create a vehicle that would bring into [the ironworkers trade] a high percentage of minorities who when they finished this training program would be qualified to earn a living at the ironworkers' negotiated wage scale." Tr. at 3298. As applied to *inexperienced* blacks, the program did indeed open new avenues of opportunity that previously may have been closed; in that respect, the Training Program is to be commended. But in aiming the Training Program broadly at all non-members who were not qualified to enter the Apprenticeship Program, the International endorsed a system that placed unnecessary barriers between *experienced* black rodmen and Union membership.

The International does not really dispute that it played a significant role in establishing the requirement that applicants complete a Union-supervised educational program before being allowed to take the journeyman examination; rather, it attempts to distance itself from these practices by arguing that the decision to establish an Apprenticeship Program or a Training Program remained

at all times within the discretion of each local. In addition, the International adamantly insists that it had no control over the day-to-day operation of these programs.

These arguments cannot parry the thrust of the plaintiffs' claim of discrimination. That claim is not that the Training Program or the Apprenticeship Program (setting aside the high school diploma requirement) were themselves discriminatory; rather it is that the requirement that rodmen complete such a program before being allowed to take the journeyman examination worked discriminatory effects. It is this requirement from which the International has not successfully divorced itself. Even if it did not *require* locals to develop and to administer educational program, we find ample evidence in the record to support the District Court's conclusion that the International actively participated in and approved of Local 201's membership procedures. Tr. C. 30. That is sufficient to establish an agency relationship between the International and Local 201; accordingly, we affirm the court's judgment holding the International liable under Title VII.

We must next consider whether the International had sufficient knowledge of the circumstances prevailing in Local 201, when it participated in and approved the local's discriminatory practices, to impute to it the intent necessary to establish liability under section 1981. This question need not detain us long, however, because in this case the intent to discriminate may be inferred from the plaintiff's statistical showing; the evidence of intent under section 1981 need not be direct. The International's support of and participation in the very practices to which the plaintiffs' statistics apply is a sufficient basis from which the intent to discriminate on the part of the International may properly be inferred. In a case based upon direct evidence of the local's discriminatory intent, it would not necessarily be possible to infer an unlawful intent on the part of the international; a prin-

cipal may innocently delegate authority to an agent who independently and unbeknownst to the principal brings an unlawful purpose to its exercise of that authority. This is not such a case, however.

C. *The International's Liability for Retaliation Against Plaintiff Bellamy*

In contrast to the overwhelming evidence of the International's awareness of and participation in Local 201's membership practices, there is not a shred of evidence nor any finding by the District Court linking the International to Bellamy's wage cut.

That was a matter purely between Bellamy, the local, and Bellamy's employer. To find the International liable in this circumstance would impose an unbounded obligation on it to police the actions of its locals, no matter how discrete or spontaneous those action may be. Because we find no evidence indicating that the International participated in, approved, ratified, or even had knowledge of Bellamy's wage cut, we reverse the District Court's judgment holding the International liable for retaliation.

VII. Liability of Construction Contractors Council

A. *Liability Under Title VII*

Defendant CCC is a multi-employer association that has two undisputed connections with this lawsuit: on behalf of its member employers, it negotiated collective bargaining agreements that govern the referral practices of Local 201, and it appointed trustees to the governing bodies of the Training and Apprenticeship Programs. On the basis of these connections, the District Court found that CCC had violated Title VII and section 1981. Tr. C. 32. Before discussing the merits of this portion of the appeal, we must first determine whether the District

Court properly exercised jurisdiction over the plaintiffs' claims against CCC.

CCC argues that the District Court lacked subject matter jurisdiction over the plaintiffs' Title VII claims against it because the plaintiffs failed to adduce any evidence that CCC was named as a respondent in the plaintiffs' charge filed with the EEOC, that CCC ever received notice of any charges against it relating to rodmen, or that the EEOC issued a notice of right to sue naming CCC. Title VII generally requires that, prior to filing suit in district court, a plaintiff must file a timely charge of discrimination with the EEOC. Within ten days of receiving this charge, the agency is required to notify the respondent named in the charge.[31] Thereafter, the EEOC initiates an investigation, and may attempt to bring about a conciliation between the charging party and the respondent. In general, if after 180 days from the time the charge was filed it remains unresolved, or if the agency dismisses the charge, the EEOC is required to issue a notice informing the charging party and the respondent of the charging party's right to sue in district court. Specifically, section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), provides that, once administrative remedies are exhausted, a "civil action may be brought against a respondent named in the charge."

The District Court found that "on September 15, 1975, the Lawyers' Committee for Civil Rights Under Law ["the Lawyers' Committee"], on behalf of numerous black rodmen, . . . filed a timely third party charge of

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[31] 42 U.S.C. § 2000e-5(e) provides, in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and the notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . . .

racial discrimination against *all defendants*. In September 1976, the Lawyers' Committee received from the EEOC a notice of its right to sue *all defendants*." Tr. F. 6. (emphasis added). At trial, John O'Neil, Executive Director of CCC, testified that CCC had in its files a notice that charges of discrimination had been filed with the EEOC against it, but O'Neil did not identify whether this notice referred to the discriminatory practices at issue in this case. When the plaintiffs attempted to introduce into evidence the document to which O'Neil referred, the District Court sustained an objection based on the fact that the document was not submitted in accordance with the plaintiffs' schedule of exhibits and that it was irrelevant because it did not explicitly identify the source or nature of the discriminatory conduct with which CCC had been charged. Tr. at 2006-08. The plaintiffs have not pointed to any record evidence that supports the contention that a charge against CCC was filed with the EEOC.

If the record were no more counter-indicative than this, we might be constrained to conclude that the District Court did not clearly err in finding that the plaintiffs had filed with the EEOC a charge against CCC. In fact, however, the contrary inference is compelled by the record considered as a whole. As CCC points out, the notice of right to sue issued to the Lawyers' Committee by the EEOC did not name CCC as a respondent. The District Court clearly erred in finding that this notice referred to "all defendants." With no evidence but O'Neil's ambiguous testimony to indicate that CCC received notice of the Lawyers' Committee's charge, and clear evidence that it did not receive notice of the plaintiffs' right to sue, the District Court could not reasonably conclude that *these plaintiffs* had filed a charge of discrimination against *this defendant*; the District Court's findings lack competent evidentiary support and are clearly erroneous.

The plaintiffs argue that even if a charge was not filed and a right to sue letter was not issued, the District Court could properly entertain the case against CCC. They rely primarily on *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), in which the Supreme Court stated that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court."

This statement cannot be used, however, to read out of the statute the administrative procedures with which a prospective plaintiff must comply. As we have stated in the past, "[Title VII's] statutory enforcement scheme . . . embodies a clearly defined policy of deferring action in federal court until a charge has been filed with the agency and an opportunity afforded the agency to attempt private settlement." *Macklin*, 478 F.2d at 985-86. *Zipes* suggests nothing to the contrary. There, the question confronting the Court was not whether a plaintiff can simply disregard the administrative procedures facially made a prerequisite to suit under Title VII; to state that question is to answer it. Instead, *Zipes* raised the much narrower question "whether the statutory time limit for filing charges under Title VII . . . is a jurisdictional prerequisite to suit in the District Court." *Zipes*, 455 U.S. at 387. The Court held that this time limit was, "like a statute of limitations, . . . subject to waiver, estoppel, and equitable tolling." *Id.* at 393; *see Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 n.6 (1984) ("We did not in *Zipes* declare that the [charge filing] requirement need not ever be satisfied: we merely stated that it was subject to waiver and tolling."); *see also Noe v. Ward*, 754 F.2d 890, 892 (10th Cir. 1985).

Even if exhaustion of the administrative procedures of Title VII is not jurisdictional but is subject to omission when equity so requires, this would not be such a case. First, the plaintiffs argue that CCC had notice of the charges through its "representatives" on the governing

committees of the Apprenticeship and Training Programs, both of which bodies were named in the charge. There may be, circumstances in which an EEOC charge and right to sue notice against one party may provide notice to another related party sufficient to satisfy the plaintiff's duty to comply with the legislatively mandated administrative prerequisites to suit. *See Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1358-59 (9th Cir. 1975). Here, while it is true that CCC appointed trustees to these committees on behalf of its member employers, the committees are distinct legal entities with which CCC has no ongoing relationship. The relationship between CCC and the committees is too attenuated to conclude that notice to the committees is sufficient to impute notice to CCC.[32]

Second, the plaintiffs argue that CCC "waived" the administrative prerequisites because it failed to raise the issue before the trial court in accordance with deadlines for dispositive motions to which the parties and the court agreed. This argument is frivolous. There is no conclusion by the District Court that CCC "waived" the statutory prerequisites to suit; instead, the District Court

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[32] In *Gray v. International Bhd. of Electrical Workers*, 10 Fair Empl. Cas. (BNA) 565 (D.D.C. 1975), the District Court allowed plaintiffs to maintain a Title VII action against an employers association not named in the administrative charge. The court found that the association received "ample notice" of the EEOC charges because it was a member of a "related" joint apprenticeship and training program that received notice of the administrative charge. Even if we were to regard this authority as persuasive, however, this case is quite different. CCC is not a "member" of either the Training or the Apprenticeship committee, nor is there any indication that CCC is otherwise "related" to the committees.

We further note that there is no allegation here that CCC is an indispensable party under Federal Rule of Civil Procedure 19, which in some circumstances may provide a basis for joinder of a party in a Title VII suit despite the absence of any charge filed with the EEOC naming that party as a respondent. *See Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974).

specifically (and erroneously) found that a charge against "all defendants" had been filed with the EEOC and that a notice of the right to sue had been issued against "all defendants." In this it erred; so far as the record reveals, the plaintiff failed to comply with the administrative prerequisites to filing suit in the District Court. We therefore reverse the District Court's judgment holding CCC liable for racial discrimination under Title VII.

B. *Section 1981 Liability*

The procedural requirements applicable to Title VII claims need not be satisfied before a claim under section 1981 may be entertained by the courts. *Macklin, supra*, 478 F.2d at 996. We must therefore still consider the merits of the plaintiffs' section 1981 claim against CCC.

The District Court found CCC liable under section 1981 because it negotiated the collective bargaining agreement with Local 201, Tr. F. 140, appointed trustees to the Training and Apprenticeship committees, Tr. F. 141, and knew or should have known of the discriminatory impact of Local 201's referral system. Tr. F. 142. As we noted above, in *General Building Contractors, supra*, the Supreme Court has held that an employers association may be liable under section 1981 for the discriminatory acts of a labor organization with which it has negotiated a collective bargaining agreement only if an agency relationship can be established between the union and the association. The plaintiffs attempt to distinguish this case from *General Building Contractors* on the ground that CCC is directly, not vicariously, liable for acts of discrimination against the plaintiff classes.

The collective bargaining agreement between CCC and Local 201, including the referral clause, is racially neutral on its face. Indeed, it provides expressly that "[t]he Union shall select and refer applicants for employment without discrimination by reason of . . . race, creed, color

or national origin . . . ." Defendant's Exhibit 10. The agreement operated in a discriminatory manner only because of the local's restrictive membership policies. CCC's role as a negotiator in the collective bargaining process is therefore indistinguishable from that of the multi-employer agent in *General Building Contractors. See id.* at 392-93 n.18. The plaintiffs claim, however, that unlike the bargaining agent in *General Building Contractors*, CCC knew or should have known of the discriminatory effects of the referral clause, and the District Court so found. CCC's willingness to agree to a clause that it knew was discriminatory, it is argued, is itself an act of discrimination.

Assuming that the referral system operated in such a way as to discriminate against black rodmen, *see Tr.* F. 109, Tr. C. 21(h), and assuming for the moment that the District Court did not clearly err in finding that CCC knew or should have known that the referral clause had a discriminatory impact, Tr. F. 142, 144, we nonetheless fail to see how these findings support the inference that CCC itself discriminated. It is undisputed that CCC had nothing to do with Local 201's membership practices. It is also undisputed that CCC does not play a role in determining which rodmen well be referred to particular jobs. Thus, CCC's involvement in the referral system was limited to negotiating the facially neutral system's inclusion in the collective bargaining agreement. Even if the collective bargaining agreement were taken to evidence CCC's knowledge, indeed its approval, of the local's discriminatory practices—and we do not so read it—that agreement is not self-executing. Whatever knowledge CCC may have had of the discriminatory practices at issue in this case, the plaintiffs cannot escape the fact that it was the *local's* actions and policies that discriminated against the plaintiffs. Therefore, the plaintiffs' section 1981 claims, insofar as they rely on CCC's role in negotiating the collective bargaining agreement, depend

upon the existence of an agency relationship between CCC and the local.

The same conclusion holds true with respect to CCC's involvement in the Apprenticeship and Training Programs. It is undisputed that the apprenticeship and training committees, not CCC, administer these programs. As a result, CCC's liability again turns on the existence of an agency relationship, here between it and the committees. We therefore reject the plaintiffs' attempt to remove this case from reach of the principles set forth in *General Building Contractors.*

In applying these principles, we first address two of the District Court's findings that, if not clearly erroneous, would distinguish the facts of this case from those of *General Building Contractors.* First, the court found that CCC knew or should have known that Local 201 was discriminating against experienced black rodmen and that the referral system "had the effect of implementing and perpetuating racial discrimination." Tr. F. 142. *Cf. General Building Contractors,* 458 U.S. at 381 (noting that district court found plaintiffs failed to prove that employer associations "were actually aware of the union discrimination"). Second, the court found that "CCC controls access to employment on unionized rodman jobs." Tr. F. 140.

We need not consider whether the findings, taken together or viewed separately, are sufficient to establish the agency relationship between CCC and the other defendants required by *General Building Contractors.* Our review of the record and the District Court's reasoning reveals that these findings were conceived in error.

There is no direct evidence that CCC knew that the local's membership practices were discriminatory or that the referral system had a discriminatory effect. Instead, the court found it "proper to infer" that CCC had such knowledge on the basis of four factors: (1) the bargain-

ing relationship between CCC and the local; (2) CCC's attempt to negotiate the referral clause out of the collective bargaining agreement; (3) a letter in CCC's file suggesting that the referral system operated by another local was discriminatory; and (4) CCC's "participation" in the Apprenticeship and Training Programs. Tr. F. 142-44. We take these factors up in turn.

(1) CCC employs only two persons. Its primary function is to negotiate collective bargaining agreements on behalf of its member employers. The collective bargaining agreements that it has negotiated with the local, as we stated above, are all facially neutral with respect to race, and the latest agreement expressly requires the local to implement the referral system in a racially neutral manner. CCC does not employ rodmen; it does not police the local's implementation of their agreement; it has received no complaints from rodmen or employers concerning the discriminatory manner in which the local has implemented the agreement. *See* Tr. at 1981. We simply fail to understand how the mere fact that CCC negotiated collective bargaining agreements with the local provides a reasonable basis for inferring the CCC knew or should have known that the referral system had the effect of "implementing and perpetuating" racial discrimination practiced by the Union through its membership polices.

(2) We smilarly disagree that CCC's attempt to eliminate the referral clause during its negotiation of the agreements is in any way indicative that CCC knew about the local's discriminatory practices. There is no evidence to suggest that CCC's attempt to eliminate the referral clause was based on knowledge of its discriminatory effects. Indeed, CCC maintains that it attempted to eliminate the clause because its employer members wished to have greater control over which employees to hire; seen in this light, CCC's proposal merely reflects employers' normal dissatisfaction with the exclusivity of the hiring hall arrangement and the concomitantly higher

costs of employing journeymen rather than non-union rodmen. We find this conventional explanation for CCC's bargaining proposal much more plausible than the speculative proposition that CCC was responding to the local's discriminatory practices. Absent even a scintilla of evidence that the local's discriminatory practices played a motivating role in CCC's decision to seek the elimination of the clause, we do not believe that that decision supports the inference that CCC knew that the clause operated in a discriminatory manner.

(3) We are also puzzled by the suggestion that a memorandum in CCC's files relating to a different local's referral system supports the inference that CCC knew or should have known of Local 201's discriminatory policies. The memorandum suggested that the referral system of Local Union 5 may have been operated by that local in a manner that violated the "Washington Plan," an affirmative action plan to which Local 5 was subject. Local 201 was not subject to the plan. Moreover, even if Local 5's referral system were identical to Local 201's (and there is no evidence that it was even similar), it would not follow that CCC's knowledge that Local 5's referral system failed to comply with an affirmative action plan provided a basis for inferring that Local 201's referral system failed to comply with statutory anti-discrimination laws. The inherent illogic of such a leap is magnified when one realizes that the Washington Plan did not purport to operate in a racially neutral manner. The memorandum therefore provides no basis whatever for inferring that CCC knew or should have known of the racially discriminatory practices implemented by Local 201.

(4) Finally, we consider the District Court's finding that "CCC's participation in the Training Program and the Apprenticeship Program is sufficient itself to justify the finding that CCC knew or should have known of the racial discrimination." Tr. F. 142. We first note that

CCC's participation in these programs is extremely limited. It has no authority over the administration of these programs and does not participate in their actual operation. Instead, CCC's "participation" is limited to its appointment of three trustees for the Apprenticeship Program and to the appointment of the employer's representatives to the Training Program. Tr. at 1959-60.

We cannot agree that this limited relationship with the educational programs makes it reasonable to charge CCC with knowledge of the local's discrimination against experienced black rodmen, much less perpetuation thereof through the referral system. There is no evidence of an on-going relationship between CCC and the trustees it appointed, nor even that CCC ever communicated with them. Perhaps the District Court assumed that these trustees acted as CCC's agents. If so, their knowledge of the local's discriminatory practices might provide some support for the District Court's finding. *See* RESTATEMENT (SECOND) OF AGENCY § 272 ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information."). An agency relationship between CCC and the trustees cannot be assumed, however, on the facts of this case. As the Supreme Court held in *General Building Contractors*, for the trustees of an apprenticeship program to be the agents of an employer,

> [t]he employer must . . . enjoy a right to control activities of [the apprenticeship committee], and there is no record basis for believing that to be the case. Neither is a right of control inferable merely from the power of the associations to appoint half of the [apprenticeship committee's] trustees. It is entirely possible that the trustees, once appointed, owe a fiduciary duty to the [apprenticeship committee] and the apprentices enrolled in its programs, rather than to the entities that appointed them.

General Building Contractors, 458 U.S. at 395 (citing *NLRB v. Amax Coal Co.*, 453 U.S. 377 (1981)).

Because we can see no basis on which the District Court could infer that CCC-appointed apprenticeship or training committee trustees acted as CCC's agents, we cannot accept the District Court's finding that CCC's "participation" in those committees is sufficient to infer that CCC knew or had reason to know of the local's discriminatory practices.

We next consider the District Court's finding that CCC "controls access to employment on unionized rodman jobs." There is a complete dearth of evidence to support this broad and facially implausible finding. It necessarily implies that CCC "controls" the local, for it is the local that is responsible for the day to day administration of the referral system, which is the exclusive means by which rodmen can obtain employment on unionized jobs. Again, *General Building Contractors* is instructive:

> In the run of cases, the relationship between an employer and the union that represents its employees simply cannot be accurately characterized as one between principal and agent. . . . Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured.

Id. We therefore reject the District Court's finding as a clear error.

Without the support of clearly erroneous findings, the plaintiffs' claim, and the District Court's conclusion that CCC violated section 1981, ultimately rest upon facts that are indistinguishable from those in *General Building Contractors*. So, too, must be the result. Accordingly, we reverse that portion of the District Court's judgment holding CCC liable for intentional discrimination under section 1981.

VIII. Remedies

Defendants challenge several aspects of the District Court's Amended Order granting relief. Defendants urge that in its Order the District Court "failed to fulfill one of its most basic responsibilities—fashioning remedial relief appropriate to its Trial Findings. Instead, the Court foisted upon Local 201 a groundless judicial mandate which will have far-reaching and permanently harmful effects." Brief of Local 201 at 120. In crafting Title VII relief, a district court must, of course, "tailor its order[s] to fit the nature of the violation it seeks to correct." *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3050 (1986) ("*Sheet Metal Workers*"). Ordinarily, remedial orders may seek only to eliminate the discriminatory practices at issue;[33] they may not lawfully force a union to admit unlimited members or to admit unqualified workers. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978).

A. *The Argument that the Amended Order Impermissibly Requires the Union to Admit Unlimited Numbers of Members*

Defendants challenge three specific aspects of the Amended Order, which we will discuss in a moment.

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[33] In some situations, where past discrimination has been persistent and obstinate, relief going beyond traditional make-whole remedies has been deemed appropriate. *See, e.g., Sheet Metal Workers*, 106 S. Ct. at 3035-37; *United States v. Paradise*, 107 S. Ct. 1053 (1987). This is obviously not such a case, *see supra*, Part IV.E. Moreover, the relief ordered in this case is not the sort of a race-conscious affirmative relief challenged in cases such as *Sheet Metal Workers* and *Paradise*. In this case, the Amended Order grants relief only to specific victims of discrimination, namely the members of the plaintiff classes; the relief here is entirely backward looking, imposing on defendants no future burdens to achieve any sort of specific racial percentages. In short, this case deals only with traditional make-whole relief.

As an initial matter, however, we deal with defendants' broadside that the Amended Order impermissibly requires the Union to admit unlimited numbers of members to its roles. We reject this argument. First, it is not at all clear that the impact of the Amended Order on the Union's membership ranks will be profound, for the class of plaintiffs is not overwhelmingly large. Second, even if the impact of the Order on the size of Union ranks were significant, the Order does no more than remedy the wrongs done to individual workers who were victims of discrimination. Defendants, we are constrained to conclude, have ignored the remedial nature of the Amended Order. In our view, the District Court was more than justified in seeking to remedy the individual wrongs perpetrated against each class member.

B. *Special Benefits for Four Named Members*

Part II(A) of the Amended Order requires the Union immediately to admit, without requiring any examination or educational training, the four named plaintiffs who (as of the time of the Amended Order) were not yet members. In their briefs, defendants urge that this was an abuse of discretion. However, at oral argument, defendants' counsel conceded that the particularized relief for the four named members is, from a practical standpoint, no longer at issue. This is so because the Union, even if it prevailed on this point, indicates that it would not seek to remove the two plaintiffs who are now Union members; in addition, the two plaintiffs who have failed to join the Union appear by their own conduct no longer to have an interest in securing Union membership under the umbrella of the specific relief fashioned by the trial court.[31] We thus take counsel at her word and decline to consider further what appears to be a non-issue.

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[31] The Amended Order, which was entered on April 11, 1986, has been in effect for more than a year. *See* Brief of Appellees at 3. According to counsel's representations at oral argument, two of

C. *Permitting Class Members with 3000 Hours of Experience to Take the Journeyman Exam Without Classroom Training*

Defendants also object to Part II(B) of the Amended Order, which (in part) requires the Union to allow class members with 3000 hours of experience to take the journeyman exam without undergoing classroom instruction of any sort. Defendants urge that this requirement ignores the Union's legitimate interest in assuring that only qualified workers become rodmen, and in limiting its membership ranks. In defendants' view, the District Court "simply ignored the principle that Title VII remedial orders cannot require the placement of those who lack the appropriate qualifications." Brief of Local 201 at 127. Defendants argue that the breadth of the court's remedial power is limited by this unalterable command.

We agree with defendants' articulation of the principle, but disagree that it was violated by this aspect of the District Court's order. As we have previously indicated, the Union may not lawfully impose the sort of educational requirement it has heretofore mandated as an absolute prerequisite for admission, regardless of a rodman's experience and ability. As it should, then, the Amended Order seeks to remove the discriminatory barrier posed by the absolute educational prerequisite. The appropriate way to remedy the injury inflicted on class members—that is, to put them in the position they would have enjoyed absent discrimination—is to allow them to take the exam once they are sufficiently experienced to do so.

Therefore, defendants' only plausible objection is that 3000 hours constitutes too little experience for the exam alone to serve as a sufficient check to screen out the in-

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the specially benefited named plaintiffs are today members of Local 201, and two have chosen, for whatever reason, not to take advantage of Part II(A) of the Amended Order.

competent. Although we are sympathetic with the proposition that there is no way definitively to determine the precise quantum of on-the-job experience that qualifies one to take the exam, this is, in truth, a reason to *affirm* the District Court's choice of 3000 hours.

It is, of course, elementary that Congress has granted district courts broad discretion to craft Title VII remedies. *See* 42 U.S.C. § 2000e-5(g) (1982); *see also Sheet Metal Workers*, 106 S. Ct. at 3034-35; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364-67 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976). Because 3000 hours is, beyond serious dispute, within a reasonable realm, we cannot say that the District Court abused its discretion in embracing that figure. We disagree with defendants' objection that 3000 hours has no basis as a measure of experience sufficient to qualify one to become a journeyman rodman. Three thousand hours is obviously substantially more than the level of the experienced pool benchmark (2150 hours), and in our view is sufficiently reasonable to serve as an appropriate standard.

We are comforted in this conclusion by two facts: first, the 3000-hour figure was negotiated by the parties; and second, defendants have not come forward with an alternative figure. Defendants downplay the significance of the negotiated nature of the Amended Order, and we agree that under the circumstances that factor is not worthy of great weight. But in determining whether the District Court abused its discretion, the fact that defendants had a hand in negotiating the figure is at least pertinent. Moreover, defendants' failure to offer an alternative as to the amount of experience sufficient to qualify for entrance to the exam makes us most reluctant to conclude that 3000 hours is outside the bounds of the District Court's discretion.

D. *Automatic Membership for Class Members With 6000 Hours of Experience*

Part II(B) of the Amended Order also requires that class members with at least 6000 hours of experience be exempted from *both* classroom training and the journeyman exam, and admitted immediately to full Union membership. Defendants object to this requirement as unwarranted by the record because there has been no allegation or finding that the journeyman exam itself was in any way unlawful. We agree. Indeed, it would be hard to imagine such an allegation since the pass rate on the exam (since the end of the Open Period) was virtually 100 percent. We therefore hold that the District Court abused its discretion in ordering the Union to admit forthwith all class members with 6000 hours of experience, and vacate that portion of the Amended Order.

IX. The Union's Levy of a Special Assessment on Members to Finance the Present Litigation

In 1982, Local 201 determined that it lacked sufficient funds to meet the legal expenses it had incurred in this case. Accordingly, local officials proposed to levy a special assessment against local members. At the September 1982 union meeting, a resolution to that effect was introduced, discussed and when no objections were raised, approved by a vote of 43 to 14. Local 201's General Executive Board thereafter ratified the resolution, and each member was assessed $182. When several members refused to pay their assessment, the local instituted internal disciplinary proceedings against them. The plaintiffs moved the District Court for a preliminary injunction to restrain the local from pressing charges against any members of the plaintiff classes.

The parties reached a tentative resolution of this dispute, which the District Court approved. *Berger v. Iron*

Workers Reinforced Rodmen, Local 201, No. 75-1743, Stipulation (D.D.C. Dec. 29, 1983). They established an interest-bearing escrow account into which class members were required to deposit, in periodic installments, an amount equal to their assessment. Local 201 agreed to refrain from taking any assesment-related disciplinary action against members of the plaintiff classes, the plaintiffs agreed that such forebearance would be without prejudice to the union's claim of right to make the assessments, and to impose discipline for non-payment, and both sides preserved their right to appeal the "decision of the [District] Court as to any matter relating to this case. . . ." *Id.*[35]

In its Amended Order of April 11, 1986, the District Court ordered all payments deposited into the escrow account returned to the plaintiffs. The court also permanently enjoined the local from taking any disciplinary action against members of the plaintiff classes "for failure to pay any dues, charges, fees (whether previously levied or levied in the future) assessed against members of Local 201 and/or the International in order to pay for Defendants' legal fees and other costs of defending this action." *Berger v. Iron Workers Reinforced Rodmen, Local 201*, No. 75-1743, Amended Order at 12 (D.D.C. Apr. 11, 1986).

The provisions of the District Court's order respecting the escrow account and the special assessment are not accompanied by findings of fact or conclusions of law. Rather than speculate about the reasoning supporting them, we would ordinarily remand the case to the District Court for further findings. In the circumstances of this too-prolonged litigation, however, a remand would

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[35] We reject as frivolous the plaintiffs' suggestion that, having submitted this issue to the District Court, the defendants are somehow foreclosed from arguing that that court exceeded its remedial powers in ordering the escrowed funds returned to the plaintiffs.

be as unfortunate as it is unnecessary. Given the origin of such findings and conclusions as the court did enter, we are satisfied that the plaintiffs will present us with any possible reasoning upon which the District Court's order may have been grounded. As we find their arguments unpersuasive, we have no occasion to remand on this issue.

The plaintiffs do not argue that the assessment itself was discriminatory in purpose or effect. The court's order therefore cannot be justified as a remedy for an independent violation of Title VII or of section 1981. We also reject the plaintiffs' contention that the Amended Order may appropriately be viewed as an award of compensatory or punitive damages under section 1981.[36] The District Court has neither held hearings on damage issues nor entered a final order determining that compensatory and punitive damages are warranted in this case. *See id.* at 12.

The plaintiffs offer two additional justifications for the order. First, they argue that it would be unjust to require the plaintiff classes to pay for the local's defense of its discriminatory practices. Second, they argue that the special assessment violates, at least in principle, section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), which makes it unlawful for any labor organization to "limit the right of any member thereof to institute an action in any court . . . ." The special assessment, they claim, effectively "chills" members of the plaintiff classes or members of a class of potential future litigants from asserting their statutory rights.

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[36] *See Hariss v. Richards Manufacturing Co.*, 675 F.2d 811, 814 (6th Cir. 1982): "a private plaintiff who sues under both Title VII and Section 1981 may obtain the equitable relief provided by Title VII and such equitable relief as well as legal relief by way of compensatory and punitive damages afforded by Section 1981."

By contrast, Local 201 suggests that the assessment is a legitimate financial obligation for which all members of the Local are responsible. We agree. As the Supreme Court noted in *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America* ("*Marine Workers*"), 391 U.S. 418, 424 (1968), "§ 8(b)(1)(A) [of the Labor-Management Relations Act] assures a union freedom of self regulation where its legitimate internal affairs are concerned."[37] Thus, in *International Union of Operating Engineers, Local 450*, 113 L.R.R.M. (BNA) 1031, 1032 (NLRB Div. of Advice, Mar. 31, 1983), the National Labor Relations Board's Division of Advice concluded:

> [A] union is privileged under Section 8(b)(1)(A) to levy uniform assessments on its members to raise money for the purpose of meeting expenses reasonably related to the administration of the Union. Moneys that are expended to defend against charges or suits are reasonably related to the administration of the union. Thus, a union can establish and impose on its membership assessments to cover the costs of defending itself before the Board, where such assessments fall uniformly on all members, including those members who filed the Board charges.

Accord Hunter v. United Air Lines, 10 Fair Empl. Prac. Cas. (BNA) 787, 789 (N.D. Cal 1975).

We can discern no basis upon which to distinguish between an assessment imposed by a union to finance its defense against an unfair labor practice charge and one imposed to finance its defense against a suit brought under the civil rights laws. In each case, the defending union is faced with a charge by one or more of its mem-

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[37] Section 8(b)(1)(A) forbids labor organizations from restraining or coercing employees in the exercise of guaranteed rights, but makes an exception for the union's "right . . . to prescribe its own rules with respect to the acquisition or retention of membership . . . ." 29 U.S.C. § 158(b)(1)(A).

bers that the Union has acted in derogation of individual rights guaranteed by federal law. The plaintiffs' attempt to argue that charges of racial discrimination involve a "public policy issue," while unfair labor practices charges do not, is insupportable in reason or in law. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n. 11 (1975) (noting that the remedial provisions of Title VII were modeled on the remedial provisions of the National Labor Relations Act).

We are cognizant that in Title VII Congress has invested the district court with broad equitable powers "to make possible the 'fashion[ing] [of] the most complete relief possible.'" *Albemarle Paper*, 422 U.S. at 421. These broad powers, however, are not unbounded. *Id.* at 416. ("That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.") They do not extend so far into a union's internal affairs as to control the manner in which it meets the costs of defending itself in court, regardless of the nature of the charges levied against it, unless the union's method of doing so is unlawful in and of itself.

Congress placed procedural conditions on a union's right to exact dues, fees, and assessments from its members.[38] Once a union has complied with those conditions,

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[38] Section 101(a)(3)(A) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 522, 29 U.S.C. § 411(a)(3)(A), requires that

> no general or special assessment shall be levied upon [members of a local union], except . . . (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such a question, or (ii) by a majority vote of the members in good standing voting in a membership referendum conducted by a secret ballot . . . .

The plaintiffs do not dispute that the provisions of the LMRDA have been fully complied with.

and in the absence of any allegation of discriminatory purpose or effect, we believe that Title VII provides no power to the federal courts to undo what the union has legitimately done.

We also believe that the asserted "chilling effect" on the plaintiffs' exercise of statutory rights must be placed in its proper perspective. While we recognize that "[a]ny coercion used to discourage, retard, or defeat [union members'] access [to legal process] is beyond the legitimate interests of a labor organization," *Marine Workers*, 391 U.S. at 424, the assessment in this case cannot credibly be regarded as a device to impede union members' access to the courts. The assessment was imposed *only* because the funds then available to the local, which also were drawn from the pockets of union members (including, presumably, the plaintiffs who had become union members) in the form of dues or other fees, were insufficient to meet the local's legal expenses. Absent a finding that an assessment was discriminatory in purpose or effect, that it was imposed to engender hostility between members of the local who did not participate in the plaintiff classes and those that did, *see International Union of Operating Engineers, Local 450*, 113 L.R.R.M. at 1032, or that the assessment was punitive as applied to members of the plaintiff classes, *see Pawlak v. Greenawalt*, 628 F.2d 826 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981), we fail to see a proper place for concern about a chilling effect. The universality of the assessment distinguishes it from the assessments imposed by unions that were found in other cases to be unlawful. *See, e.g., id.* at 828 (union member fined for failing to pursue internal union remedies before filing lawsuit); *Ross v. Int'l Bhd. of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976) (same).

There is no evidence that this uniform, duly authorized assessment was levied for any purpose other than meeting the union's legitimate interest in paying its litigation

expenses. Nor is there any indication that the amount of the assessment was disproportionate in relation to the expenses actually incurred by the local. We therefore reverse the Amended Order insofar as it requires all funds in the escrow account to be returned to the contributing plaintiffs. We also vacate that portion of the order prohibiting the local from disciplining union members who refuse to pay the assessment. Finally, we direct the District Court to award all funds in the escrow account to Local 201.

X. Conclusion

Our review of this case has uncovered several clear errors in the District Court's findings of fact. (1) In particular, we have found that the record does not support the District Court's findings that the defendants engaged in unlawful retaliation against plaintiffs Berger, Lewis, Jackson, and Kirkland. (2) Nor can we discern any factual basis for the District Court's finding that the International retaliated against plaintiff Bellamy.

We have also concluded that the District erred, as a matter of law, in several respects. (1) It was error to allow the plaintiff classes to challenge the high school diploma requirement of the Apprenticeship Program without a suitable class representative. (2) The District Court also erred in holding defendant CCC liable under Title VII and section 1981 for the discriminatory practices of Local 201. (3) Nor can the District Court's order enjoining Local 201 from disciplining members who fail to pay a duly authorized assessment and requiring Local 201 to return those assessments to the plaintiffs be squared with settled legal principles.

Finally, we have concluded that the District Court abused its discretion in ordering Local 201 to admit into membership those plaintiffs having at least 6000 hours of rodman experience without first requiring those plaintiffs to pass the journeyman examination.

On the other hand, we have found that the record and settled legal principles support the conclusion that Local 201 and the International, by adopting and implementing the requirement that applicants for union membership complete a Union-supervised educational program, discriminated against the properly certified classes of black plaintiffs in violation of Title VII and section 1981. There is also a sufficient factual basis in the record to support the District Court's finding that Local 201 engaged in unlawful retaliation against plaintiff Bellamy. Finally, we affirm the District Court's remedial order, with the exception noted above, as well within the court's discretion under Title VII and section 1981.

Accordingly, the judgment of the District Court is

Affirmed in part and reversed in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6217

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN LOCAL 201, *et al.*,
Appellants

INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON WORKERS, *et al.*,

and consolidated Cases No. 86-5028, 86-5275,
86-5276 and 86-5277

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil No. 75-01743)

ON APPELLANTS' PETITION FOR REHEARING

Issued July 29, 1988

James R. O'Connell and *Sally M. Tedrow* were on the Petition for Rehearing for Appellants Rodmen Local 201, Apprenticeship Committee and Training Program.

John L. Oberdorfer, *Andrew S. Newman* and *John F. Dienelt* were on the appellee's response to the petition.

Before: EDWARDS, STARR, and D. H. GINSBURG, *Circuit Judges.*

PER CURIAM: Local 201, the Apprenticeship Committee, and the Training Program have petitioned this court for rehearing on various questions. The one question to which we invited appellees to respond is whether these three entities are jointly liable for the discrimination caused by the requirement that experienced rodmen complete a Union-supervised educational program in order to be eligible to take the journeyman examination, and thus, to obtain union membership. Because we believe that our earlier opinion is unclear on this issue, and that the petitioners' position is well founded, we grant the appellants' petition for rehearing.

In our opinion we said:

> The parties have assumed, and we do not question their assumption, that Local 201, the Apprenticeship Committee, and the Training Program, although all separately named defendants, are jointly liable for any discriminatory conduct *in the operation* of the Apprenticeship and Training Program.

Berger v. Iron Workers Reinforced Rodmen, Local 201, 843 F.2d 1395, 1414 n.11 (D.C. Cir. 1988) (emphasis added). We also noted, however, that "there were no allegations of discrimination in the *administration* of the programs" by the Apprenticeship Committee and the Training Program, *id.* at 1417-18 (emphasis in original), and thus we had no occasion to pass upon the issue of their joint liability for operations. We upheld the district court's conclusion that Local 201 violated Title VII and section 1981 by requiring experienced rodmen to complete a Union-supervised educational program, *id.* at 1422, but we did not go on to address the question raised in the petition for rehearing—*i.e.*, whether the Apprenticeship Committee and the Training Program may be held jointly liable with Local 201 for the effects of that threshold requirement imposed by the union. On this issue, our opinion is silent.

The Apprenticeship Committee and the Training Program argue that the decision to require experienced rodmen to complete an educational program was made solely by the local (with, as we concluded, the approval of the International), and as joint labor management committees established pursuant to 42 U.S.C. §§ 2000e(b), (d), they had no authority to determine who must complete the programs they administer, or otherwise set standards for union membership. In any event, the record contains no evidence that either of them participated with the union in imposing the educational requirement. As a result, they maintain that neither joint committee may be held liable unless Local 201 was acting as their agent when it established the educational prerequisite to the journeyman examination, a proposition that is dubious at best. *See Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981); *cf. General Building Contractors v. Pennsylvania*, 458 U.S. 375, 391-97 (1982).

The plaintiffs admit that "the two committees are separate legal entities," but argue that because Local 201 officials served on both the Apprenticeship Committee and the Training Program, "each [defendant entity] was a participant in the imposition of educational barriers to the admission of black rodmen into the union." They maintain, for instance, that "legal niceties aside," the "Local 201 business agent, the Training Committee and [its Director] in essence functioned as one entity in operating the program" in a discriminatory way.

The plaintiffs' argument is too facile; the district juridical personality of an entity is not merely a legal nicety. Unless there is strong evidence to the contrary, we must conclude that such boundaries were intended to have some meaning, and they are not to be casually disregarded. Here there is no basis whatsoever for departing from that norm. In support of their argument for joint liability, the plaintiffs have cited decisions made by the union officials in their capacity as members of the

joint committees on the educational programs—*e.g.*, the bases for selection of apprentices and trainees, the high school diploma requirements of the Apprenticeship Program, when apprentices and trainees were ready to take the examination, and examination procedures. All of these decisions, however, related to the internal administration of those programs, which we did not hold to violate either Title VII or section 1981.

The *only* practice (along with acts of retaliation) that we held to violate Title VII or section 1981 was the local's requirement that experienced rodmen complete an educational program run by one of the two committees. The plaintiffs have pointed to no record evidence demonstrating that either the Training Program or the Apprenticeship Committee had any role (or any authority) relevant to that practice. Most significantly, the plaintiffs have not pointed to any findings by the district court that even arguably form an adequate predicate for holding these distinct entities liable jointly with Local 201 for the unilateral acts of that local.

The record before us supports only the conclusion that Local 201 and (by application of agency principles) the International are liable for the discrimination effected by the requirement that experienced rodmen complete an educational program. Given the unrebutted arguments presented in the petition for rehearing, we grant the petition and hold that the district court's conclusion that these three entities are jointly liable is a clear error and must be reversed.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1743

JESSIE BERGER, *et al.*,
Plaintiffs

v.

IRON WORKERS REINFORCED RODMEN LOCAL 201, *et al.*,
Defendants

[Filed June 7, 1985]

TRIAL FINDINGS

I

1. This is a civil rights action brought by eight black rodmen on their own behalf and on behalf of a class similarly situated, charging the defendants with employment discrimination in violation of Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Section 1981) and the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) [sic] *et seq.* (Title VII).

2. The five defendants are Iron Workers Reinforced Rodmen Local 201 (Local 201); the International Association of Bridge Structural and Ornamental Iron Workers (International); the Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 (Apprenticeship Committee); the National Iron Workers and Employees

Training Program (Training Program); and the Construction Contractors Council (CCC).

3. Jurisdiction is based on 42 U.S.C. § 2000(e)(2) and 28 U.S.C. § 1343.

4. On December 11, 1975, plaintiff Ernest Bellamy filed a timely charge of racial discrimination with the EEOC against defendant Local 201. On November 28, 1975, Mr. Bellamy received a notice of his right to sue.

5. On January 13, 1975, plaintiff Van Edward Lewis filed a timely charge of racial discrimination against defendants Local 201, International, Apprenticeship Committee and Training Program. On October 15, 1975, Mr. Lewis received from the EEOC a notice of his right to sue those defendants.

6. On September 15, 1975, the Lawyers' Committee for Civil Rights Under the Law (Lawyers' Committee), on behalf of numerous black rodmen, including plaintiffs Berger, Jackson, Kirkland, Lewis, Tucker and Bellamy, filed a timely third party charge of racial discrimination against all defendants. In September 1976, the Lawyers' Committee received from the EEOC a notice of its right to sue all defendants.

7. On October 21, 1975, plaintiffs filed this action on their own behalf and on behalf of a class similarly situated alleging violations of Section 1981 and seeking injunctive relief, back pay and attorneys' fees. On November 28, 1975, the Complaint was amended to allege violations of Title VII.

8. The plaintiff class was certified on July 27, 1976. The class is composed of (1) all black persons who have or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training Programs by the racially discriminatory practices of the defendants, and (2) all black persons who might have been or might be discouraged

by the known racially discriminatory practices of the defendants from applying for membership in the International and or Local 201 and/or from applying for admission to the Apprenticeship Program and/or the Training Program.

9. Motions for summary judgment were filed by defendants International, Apprenticeship Committee and CCC in December 1977. These motions were revised and supplemented by defendants Apprenticeship Committee and CCC in May 1978, and again by CCC in March 1979, Judge Sirica denied the motion of International on May 15, 1979, and of the Apprenticeship Committee on January 30, 1979. This Court denied the motion of CCC on May 4, 1981.

10. On May 5, 1978, defendants Local 201, Apprenticeship Committee, and Training Program filed a consolidated motion to strike the class action allegations or, in the alternative, to limit the class and compel plaintiffs to mail notice with proof of claim form to class members. The motion was denied on May 4, 1981.

A. PLAINTIFFS AND THE CLASS—

11. As certified on July 27, 1976, the plaintiff class consists of:

> (1) all black persons who have been or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training Programs by the racially discriminatory practices of the defendants, and
>
> (2) all black persons who have been or might be discouraged by the known racially discriminatory practices of the defendants from applying for membership in the International and/or Local 201 and/or from applying for admission to the Apprenticeship and/or the Training Program.

This class is represented in these proceedings by eight black rodmen.

12. Plaintiff Jesse Berger is a 48 year old black citizen of the United States and a resident of the State of Maryland. He has an eighth grade education and has worked as a rodman out of Local 201 since 1968. He became a member of Local 201 in 1976. Between 1968 and February 1976, Mr. Berger worked as a "permit worker" on union jobs to which he was referred by Local 201. During this period, despite his initial lack of experience, he was paid the same wages as those paid to union members (journeyman wage rates). As of June 30, 1975 (the date closest to the date of the Complaint for which data is available), he had worked 11,073 hours on these jobs.

As of October 21, 1975, the date of the Complaint in this action, Mr. Berger had not been given an opportunity to take the journeyman examination, which is a prerequisite to union admission and to top referral status. After numerous fruitless attempts to gain admission to the Training Program, which is administered by defendant Training Program, Berger finally was admitted in September 1974. While in the Training Program, Mr. Berger's salary was not reduced. However, Mr. Berger thought that it was unfair that he had to go through the Training Program and testified that the training sessions consisted mostly of sitting around and talking, not necessarily about rod work. Although he learned nothing new under the instruction of Mr. Malczyk, Mr. Berger entered the Training Program because it was the only way he could become a union member. Only after completing the Training Program in February 1976 was he given an opportunity to take the journeyman examination, which he passed.

Mr. Berger never sought to enter the Apprenticeship Program because he does not have a high school diploma and thus never met the entrance requirements. In addi-

tion, his age would have prevented admission to that program since he became 31 years old in 1967.

At a union membership meeting in February of 1981, Mr. Berger heard Mr. Tommy Gilmer, then-business agent of Local 201, say that he was going to make it hard on those who filed this suit.

13. Plaintiff Randolph Jackson is a 45 year old black citizen of the United States and a resident of the State of Maryland. He has a tenth grade education. He is currently a journeyman member of Local 201, although he has not done rod work since June 1976, when he was injured on the job. Mr. Jackson has worked in the rodman trade since 1965. For more than five years, he worked as a journeyman rodman on non-union-jobs, [sic] rising to the level of foreman. Beginning in 1971, he worked as a permit worker on union jobs to which he had been referred by defendant Local 201 at journeyman rates. Beginning in 1973, he frequently worked on union jobs to which he was referred by defendant Local 201 as a foreman at wage rates greater than those paid to journeymen. As a foreman, he directed the activities of up to fifteen rodmen, read blueprints, and welded. As of June 30, 1975, he had worked 5,293 hours out of Local 201.

Despite his experience, plaintiff Jackson was required to participate in the Training Program before being given an opportunity to take the journeyman examination. Classes for the Training Program were held twice weekly. Because one of the classes was devoted to welding, and because he was already an accomplished welder, Mr. Jackson was only required to attend one night. The class sessions consisted of Mr. Malczyk talking for about ten minutes, excusing himself, and then returning ten minutes before the scheduled termination. In the interim, trainees conversed among themselves. While in the Training Program, Mr. Jackson worked as a foreman, and never received reduced wages.

Mr. Jackson took the journeyman examination twice, in March and November of 1975. After taking the first examination, he was informed by representatives of Local 201 that he had failed. On December 13, 1975, after the Complaint was filed, Mr. Jackson passed the second examination. There was no difference between the two tests. Upon passing the December 1975 examination, he became a member of Local 201. Nevertheless, because he felt that he was already qualified at the trade, Mr. Jackson thought it was not proper to require him to pass an examination to become a me ber of the union.

Mr. Jackson does not have a high school diploma and thus never met the entrance requirements of the Apprecenticeship Program. In addition, his age would have prevented his admission to the program since he was 31 years old in 1970.

In January of 1975, after charges of discrimination had been filed with the EEOC in this matter, Mr. Jackson was working as a foreman for Wahib Steel at a metro worksite known as "Southwest and D" in the District of Columbia. He was transferred to another Wahib worksite nearby, for what he believed to be a two-day temporary assignment. At the end of the two days, however, he was laid off rather than sent back to Southwest and D. When he was laid off, the superintendent at the worksite told Mr. Jackson that he had orders from Mr. Vermillion to fire him. When Mr. Jackson reported this reason to Mr. Vermillion, Mr. Vermillion denied it. Although he was laid off from Wahib, other rodmen continued to perform rod work at the site.

On March 24, 1975, Mr. Jackson wrote a letter to the International, complaining of his treatment by the Local. Five or six months later, he met with someone from the International who said he would investigate the matter, but he heard no more from the International.

14. Plaintiff Tommy Kirkland is a 44 year old black citizen of the United States and a resident of the District

of Columbia. Mr. Kirkland has a sixth grade education and has worked in the rodman trade since 1963. He is now a journeyman member of Local 201. For approximately three years, he worked as a journeyman rodman on non-union jobs. Beginning in 1966, he worked as a non-union permit worker on union jobs to which he was referred by defendant Local 201 at journeyman wage rates, often working as a subforeman or "pusher" on those jobs.

Mr. Kirkland took the journeyman examination on February 20, 1971, during the four-month period (the Open Period) when any rodman with more than two years experience working out of Local 201 was allowed to take the examination. He was informed that he had failed that examination. After that, he was repeatedly refused permission to take any test for union membership without first participating in the two-year Training Program. Notwithstanding the fact that Mr. Kirkland had already worked a total of 13,617 hours out of Local 201 as of June 30, 1975, he sought to enter the Training Program. However, union officials stated that the program was full, and denied his requests to enter that program until September 1977 when he finally joined the program.

The instructor for the Training Program at the time was Mr. Robert Masler. Although Kirkland spent some seven months, two nights a week in the program, he was taught little that he did not already know, and nothing that assisted him in passing the journeyman examination. Mr. Kirkland did not think it was necessary, given his twelve years of experience at the trade—including experience as a supervisor that he should have to enter the Training Program to qualify for union membership. Mr. Kirkland also believes he has been discriminated against because white union members were allowed to work overtime, while black permit workers were not.

Mr. Kirkland has no high school diploma and thus never met the entrance requirements of the Apprenticeship

Program. In addition, his age would have prevented admission to that program since he became 31 years old in 1970.

At the time the Complaint was filed, Mr. Kirkland was working for the M. J. Byorick Co. under the direction of Ray Coda. About a week after the complaint was filed, Mr. Coda approached Mr. Kirkland and indicated that he knew of the suit. A week following that incident, Mr. Coda told Kirkland that he thought he would have already had permission to fire him. Several weeks later, Mr. Kirkland was laid off, although rodmen from another job were brought in to perform Mr. Kirkland's job.

15. Plaintiff Van Edward Lewis is a 42 year old black citizen of the United States and is a resident of the District of Columbia. He has an eighth grade education, and started working as an apprentice rodman, non-union, in 1971. Since 1973 he has worked out of Local 201 as a permit worker on union jobs, accumulating 1,249 hours as of June 30, 1975. Mr. Lewis has not been able to gain membership in defendants International or Local 201. Indeed, he has not ever been given an opportunity to take the journeyman examination. His efforts to obtain admission into both the Apprenticeship and Training Programs were continually thwarted.

During his work out of Local 201, Mr. Lewis encountered a number of situations in which he believes he was discriminated against. He testified that he was informed of the loss of his work at Rebar Construction by pink slips reading "Reduction in Force," although two white permit workers were hired the same day that Mr. Lewis and two other blacks were laid off. Mr. Lewis also testified that discrimination occurred because black workers were given the back breaking work and then laid off, while white men were allowed to complete the less physically demanding work. In December 1974 he filed charges of racial discrimination.

Mr. Lewis was admitted to the Training Program in the summer of 1980, but not without incident. On one occasion, when he went to talk with Mr. Grigsby about filling out an application, he was told there had been a complaint lodged by a foreman about work he had done nine months previously. This incident occurred after he had filed the discrimination charges. After being told repeatedly that there were no openings, and an argument with Mr. Vermillion, Mr. Lewis was finally granted an interview with Mr. Gilmer and Mr. Musgrove in 1980. Mr. Gilmer asked Mr. Lewis if he were willing to drop the charges of discrimination before he was given an application to fill out. Mr. Lewis stated that he was willing to do so and he was ultimately accepted into the Training Program. Mr. Lewis did not drop his charges, however, stating that he had "come too far now" to stop. Mr. Lewis believes he has learned little new other than how to read blueprints in the Training Program, which he has attended for a year.

Mr. Lewis does not have a high school degree and thus never met the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented his admission to that program since he became 31 years old in 1973.

16. Plaintiff Ronald Tucker is a 48 year old black citizen of the United States and a resident of the District of Columbia. He has a tenth grade education and has worked in the rodman trade since 1963. For approximately three years, Mr. Tucker worked as a journeyman rodman on non-union jobs. Since 1966, he has worked as a permit worker on union jobs to which he was referred by defendant Local 201 at journeyman wage rates. As of June 30, 1975, he had worked 4,357 hours out of Local 201. Mr. Tucker has not been able to gain membership in defendants International, Local 201, or the Training Program. He was scheduled to take an examination for union membership in the Fall of 1970, but was unable

to take the examination because he was injured in a construction accident. When he recovered from his injuries approximately six months later, Mr. Vermillion told him that the membership was full and he was refused permission to take an examination for union membership. He has since been repeatedly refused permission to take any examination for union membership.

Mr. Tucker does not have a high school diploma and thus was never able to meet the entrance requirements of the Apprenticeship Program. In addition, his age would have prevented his admission to that program since he became 31 years old in 1968.

17. Plaintiff Ernest Bellamy is a 42 year old black citizen of the United States. A resident of the State of Maryland at the time this Complaint was filed, he has since moved to the State of North Carolina. He has a seventh grade education, and worked as a rodman since 1964, and out of Local 201 from 1968 to 1976. Between September 1968 and October 17, 1975, Mr. Bellamy worked as a permit worker on jobs to which he had been referred by defendant Local 201, accumulating more than seven years experience at journeyman wage rates on union jobs and more than seven months experience as a subforeman or pusher on union jobs. As of June 30, 1975, he had accumulated 11,136 hours of rodman experience out of the Local 201 hiring hall. He last worked out of Local 201 in April of 1976, ceasing work because of an on-the-job injury to his eye.

Mr. Bellamy took the journeyman examination on April 17, 1971, during the "Open Period", when the only prerequisite was two years of experience, and was informed that he had failed. After the end of the Open Period, Mr. Bellamy was required to participate in the Training Program in order to have an opportunity to take the journeyman examination. Despite his great on-the-job experience, Mr. Bellamy had not choice but to

participate in the Training Program, which he entered in November 1973.

Mr. Bellamy's instructor in the Training Program was Mr. Joseph Malczyk. Mr. Bellamy, a practicing rodman since 1964, was taught nothing that he did not already know in the Training Program.

On September 30, 1974, Bellamy again took the examination and was told he had failed.

In November of 1974, Mr. Bellamy wrote a letter to defendant International, complaining of Local 201's refusal to admit him to membership. The International subsequently replied, promising an investigation, but Mr. Bellamy heard nothing further from it. He did, however, hear from Mr. Vermillion, who, after "exchanging words" with Mr. Bellamy about the letter, told him that he would never be referred again. Although Mr. Vermillion apparently did not effect his threat, Mr. Bellamy soon found himself working at reduced wages, purportedly in accordance with the rules of the Training Program. This was done in spite of the fact that, during his previous year as a trainee, Mr. Bellamy had received full journeyman wages.

On December 11, 1974, Mr. Bellamy filed a charge of racial discrimination against defendants with the EEOC. After taking another exam, he was finally admitted to Local 201 in September 1975.

Mr. Bellamy does not have a high school diploma and thus never met the entrance requirements for the Apprenticeship Program. In addition, his age would have prevented admission to that program since he became 31 years old in 1973.

18. Plaintiff Garrett Simmons is a 32 year old black citizen of the United States currently residing in the District of Columbia. He has a high school diploma and has worked in the rodman trade since 1971. In 1974-

1976, he worked as a permit worker on jobs to which he had been referred by Local 201 at journeyman wage rates. As of June 30, 1977, just prior to becoming a named plaintiff, Mr. Simmons had worked a total of 2,082 hours out of Local 201. He has not been permitted to take the journeyman examination without first participating in the Apprenticeship Program, to which he has been unable to gain admission. He was discouraged from applying for entrance to the Apprenticeship Program because of defendants' discriminatory practices.

19. Willie Lee McMillian is a 31 year old black citizen of the United States currently residing in the District of Columbia. He has a high school diploma and worked non-union as a rodman from 1971 through 1973 in North Carolina. While there he took a journeyman's exam and passed it, but never paid the complete fee to join the union. In 1974, Mr. McMillian moved to Washington, D.C., and began working as a permit worker on union jobs to which he had been referred by defendant Local 201 at journeyman wage rates. As of October 21, 1975, he had worked approximately 2,417 hours out of Local 201.

Mr. McMillian seeks to become a member of the International and of Local 201, but he has not been given an opportunity to take the journeyman examination because he has not participated in the Apprenticeship Program. He was discouraged from applying for entrance to the Apprenticeship Program because of defendants' discriminatory practices.

B. DEFENDANTS

20. Defendants are five labor organizations and employer associations that control the unionized portion of the rodmen trade in Washington, D.C. area. In general terms, Local 201 is the certified representative of all rodmen in this area, and negotiates collective bargaining agreements with the CCC regarding terms and conditions

of work. The agreements provide that the employers for whom the CCC negotiates will hire only through Local 201. Local 201 in turn operates a "hiring hall" by which rodmen are referred to those employers. Local 201 is a local union of the International. The Apprenticeship Program is a joint Local 201-CCC operation by which potential rodmen under age 31 are prepared for journeyman status.

21. Local 201, an incorporated association of workers primarily engaged in the rodman trade, and the building and construction industry, is a labor organization engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b) (e).[1] The number of members exceeds 15. Local 201 is an affiliate of the International. Local 201 exists, in whole or in part, for the purpose of dealing with rodman contractors in the District of Columbia; in Westmoreland, King George, Stafford, Culpepper, Fauquier, Prince William, Fairfax, Arlington, Loudon, Clarke, Frederick, Warren, Rappahannock and Spotsylvania Counties and the City of Alexandria, Virginia; and in Saint Marys, Charles, Calvert, Prince Georges, Montgomery, Frederick and Ann Arundel Counties, Maryland (hereinafter sometimes referred to as the Washington Metropolitan Area) concerning grievances, labor disputes, wages, rates of pay, hours of work and other terms and conditions of employment. Pursuant to a collective bargaining agreement, Local 201 acts as a referral hall for contractors in the Washington Metropolitan Area who are engaged in rod work. As a referral hall, Local 201 is the primary source of rodmen for contractors with whom it has collective bargaining agreements.

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[1] Defendant Local 201 and the other defendants are also "persons" under 42 U.S.C. § 1981, whom plaintiffs allege have interfered with their rights and the rights of class members to make and enforce contracts.

22. International, an unincorporated association, is a labor organization with headquarters in the District of Columbia, engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b), (e). The number of its members exceeds 15. Pursuant to its constitution, the International has pervasive authority over the affairs of affiliated local unions. Thus, for example, the International retains authority to suspend or revoke the charters of local unions and to review and approve their by-laws and collective bargaining agreements; establishes membership requirements for them; and requires local unions to seek its permission before striking.

The International has exercised control over the operations of Local 201 which are at issue in this case. It was instrumental in establishing the referral system, the Apprenticeship Program, the Training Program and the testing program for membership. It has also monitored the racial composition of Local 201, supervised the Apprenticeship Program and the Teaching Program, and participated directly in the collective bargaining process.

23. CCC is an incorporated employer association whose members include contractors and subcontractors engaged in rod work in the Washington Metropolitan Area. CCC is subject to the provisions of Title VII. CCC has represented and continues to represent its members and others in collective bargaining agreement negotiations with Local 201 and, on behalf of its members and others at all relevant times, has been and is a party to collective bargaining agreements with Local 201 concerning the terms and conditions of employment of Local 201's members. Local 201 refers rodmen to employers on whose behalf CCC negotiates and is the primary source of employees for these employers.

24. The Apprenticeship Committee is a joint labor-management committee, as defined in Title VII, 42 U.S.C. § 2000e(b), (d), composed of representatives of Local

201 and of contractors who are parties to a collective bargaining agreement with Local 201. Three representatives are appointed by Local 201, and three by CCC. The Apprenticeship Committee supervises, administers and controls the Apprenticeship Program in the iron work industry within the jurisdiction of Local 201. The Apprenticeship Program is limited in size, and in the number of sessions offered. It is restricted to individuals 30 years of age or younger who possess a high school diploma or its equivalent. Apprentices are paid lower wages than are other non-union individuals who are referred to work from Local 201.

25. The Training is a joint labor management committee as defined in Title VII, 42 U.S.C. 2000e(b), (d), composed of representatives of Local 201 and of contractors who are parties to a collective bargaining agreement with Local 201. Defendant International was instrumental in establishing this program in 1971-72.

C. MEMBERSHIP REQUIREMENTS, TESTING AND REFERRALS

26. The rodman trade is a construction trade. It is a less-skilled subset of the general category of "ironworker," and consists primarily of handling and positioning the steel rods used to reinforce structures of various types.

27. A high school diploma is not necessary in order to perform the work of a journeyman rodman.

28. The Constitution of the International establishes the qualifications for membership in Local 201. Article II, Section 2 of the Constitution provides:

> To be admitted to membership in any local union of the International Association one must be a practical workman versed in the duties of some branch of the trade as set forth in Section 1 of this Article,

of good moral character and competent to demand standard wages.

29. Article XXI, Section 2 of the Constitution provides that "[e]ach local union, except shopmen's local unions, shall have an Examining Committee to examine the qualifications of candidates seeking admission as members."

30. The Collective Bargaining Agreement (Agreement) requires that a journeyman examination be held at least monthly. It provides:

> The Local Union, through its Examining Board, shall examine all job applicants who have not previously passed an examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers in order to determine whether they are qualified to perform the work of the craft as a mechanic and be eligible for referral. Such examination shall be held at least every month.

31. No examination given by Local 201 has ever been shown to be a valid predictor of job performance, as required by the Equal Employment Opportunity Commission's (EEOC) Guidelines on Employment Testing Procedures, 29 C.F.R. § 1607 (1970).

32. During the period from June 1971 through October 1975, the journeyman examination was given less frequently than once every month.

33. Prior to February 1971, a rodman could qualify to take the examination in one of two ways: (1) by completing the Apprenticeship Program; or (2) by amassing an unspecified amount of experience and requesting the permission of the Executive Committee, which, in its discretion, decided whether or not the rodman could take the examination.

34. From February through June 1971, the Apprenticeship Program remained a way of qualifying for the

examination. In addition, the Local allowed any rodman with at least two years of experience working out of Local 201 to take the examination. To this end, officers of Local 201 themselves identified those rodmen with sufficient experience and invited approximately 100 rodmen to be examined. This period has been identified in these proceedings as the "Open Period." The Open Period procedures ended June 12, 1971.

35. Since June 1971, there have been only two ways to qualify for the examination. As before, a man could enter and successfully complete the apprenticeship program. Beginning in September 1972, a man could seek to enter the Training Program, an affirmative action program which was intended to provide training for those over age 31. The age requirement rendered the programs mutually exclusive: a rodman or potential rodman could qualify for one, but not both programs.

36. Since a trainee had to spend a minimum of six months in the Training Program before he could be permitted to take the examination for membership, the earliest a trainee could become a union member was March 1973.

37. In order to enter the apprenticeship program, a man must be between the ages of 18 and 30, possess a high school diploma (or its equivalent), be physically able to perform the work of the trade and submit an application. The application is, in general, submitted to the Local's Apprenticeship Committee or (since 1968) to its Apprentice Coordinator. At all times, the Apprentice Coordinator has been white. Potential applicants who have not possessed the educational requirement have been refused apprenticeship application forms by the Local.

38. Prior to 1973-74, applications to the Apprenticeship Program were accepted on a year-round basis. Since that time, applications have been limited in terms of time—typically to a two-or-three-day period—and in

terms of the number that will be accepted. An applicant must demonstrate proof of age and education upon application. If the application is filed, the applicant must secure a physical examination before he is finally accepted.

39. Upon acceptance, the apprentice enters into a contract between himself and the Joint Apprenticeship Committee called an "Indenture Agreement", detailing terms and conditions of employment. This contract is then forwarded to the District of Columbia Apprenticeship Committee, (DCAC) which approves the contract. Upon approval, the apprentice is termed "indentured."

40. The indenture agreement provides for a "probation" period of sixty days, during which either party can cancel without cause. After sixty days, certain grievance procedures become applicable, and the apprentice can only be removed for cause. In addition, at the end of sixty days the apprentice must pay the apprentice inition fee, one-half of the journeyman fee. Upon payment, the apprentice becomes an apprentice member of Local 201 and the International.

41. Although the Training Program has been in existence since 1972, and although apprentices have always been eligible for "apprentice membership", trainees did not become eligible for this limited form of membership until the Fall of 1979. At that time, the International initiated the category of "trainee members." As in the case of apprentices, trainees can become "trainee members" upon acceptance into the Training Program and payment of one-half of the journeyman initial fee.

42. The Training Program is funded by the Department of Labor (DOL) and is supervised by the National Iron Workers and Employers Training Program (NIETP), a DOL-International corporation. To qualify for entrance, a man has to be at least 31 years old, be physically able to perform the trade and submit the application. There has never been an education prerequsite.

43. The purpose of the Training Program is to assist minorities in becoming journeymen members of Local 201. By its terms, the program is directed toward older, uneducated and employed minorities. An additional qualification for admission which was added by the Training Program was a preference based on years of experience at the trade. In 1977, the cutoff was 12 years of experience.

44. Pursuant to its collective bargaining agreement, Local 201 refers rodmen to jobs in the Washington Metropolitan Area and in other cities and counties within its territorial jurisdiction.

45. Rodmen who are not members of Local 201 (or another local union affiliated with the International) may be referred for work pursuant to the collective bargaining agreement.

46. The Collective Bargaining Agreement between Local 201 and the CCC establishes, *inter alia*, an exclusive hiring hall arrangement.[2] With certain limited exceptions, employers who comprise the CCC agreement to hire only rodmen referred by Local 201, while Local 201 agrees to provide workers upon request. (PX 1, Art. 3, § 2). In other words, Local 201 acts as an employment agency for contractors who need rodmen. To this end, the "Referral Clause" exists in the Agreement.

47. As a "employment agency," the Local is constrained by federal law from granting preference on the basis of union membership. Thus, the Agreement provides that:

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[2] The Agreement provides that an employer may directly employ a minimum number of "key" employes (superintendent, general foreman, foreman), as well as former employees who have been employees during the previous year. (1974 Agreement). The latter provision is generally referred to as the "recall" provision. In addition, in certain emergent situations, the employer may hire directly.

> [t]he Union shall select and refer applicants for employment without discrimination against such applicants by reasons of membership or non-membership in the Union or by reason of race, creed, color or national origin and such selections and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements.

48. Procedurally, rodmen who want to work for CCC employers apply to Local 201 for referral. Referrals are to be made pursuant to Article 3 of the collective bargaining agreement. Section 5 of Article 3 provides:

> The Union shall register all applicants for employment on the basis of the Groups listed below. Each applicant shall be registered in the highest Group for which he qualifies.
>
> GROUP A
>
> All applicants for employment who have worked at the trade as a mechanic or apprentice for the past four (4) years; have previously passed a journeyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers qualifying them to work as a mechanic at the trade; have been employed for a period of at least one (1) year during the past four (4) years by Employers (parties to collective bargaining agreements with the Union), and who have actually resided for the past year within the geographical area constituting the normal labor market.
>
> GROUP B
>
> All applicants for employment who have worked at the trade as a mechanic or apprentice for the past four (4) years; and have previously passed a jour-

neyman's examination conducted by a duly constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers qualifying them to work as a mechanic at the trade.

GROUP C

All applicants for employment who have worked at the trade as a mechanic or apprentice for the past two (2) years or more and who have for the past year actually resided within the geographical area constituting the normal construction labor market.

GROUP D

All applicants for employment who have worked at the trade for more than one (1) year.

Section 6 of Article 3 provides:

The Union shall maintain each of the separate Group lists set forth above which shall list the applicants within each Group in the order of the dates they registered as available for employment.

Section 7 of Article 3 provides:

Employers shall advise the Union of the number of applicants needed. The Union shall refer applicants to the Employer by first referring applicants in Group A in the order of their places on said list and then referring applicants in the same manner successively from the lists in Group B, then Group C and then Group D. Any applicant who is rejected by the Employer shall be returned to his appropriate place within his Group and shall be referred to another Employer in accordance with the position of his Group and his place within the Group. Upon a registrant being referred for employment and actually employed on a job more than three (3) days,

> such registrant's name shall be removed from the list until such time as his employment has been terminated, at which time he shall be registered at the bottom of the appropriate list under which he is entitled to be registered. If a registrant, upon being referred in regular order, refuses to accept the referral, such registrant's name shall be placed at the bottom of the appropriate list under which he is entitled to be registered.

49. Local 201 maintains each of the separate Group lists, ranking the applicants within each Group in the order of the dates they registered as available for employment. If two or more members of a Group register on a particular day, they are ranked in order of registration on that day. When contractors actually request rodmen, the Local is to:

> refer applicants to the Employer by first referring applicants in Group A in the order of their places on said list and then referring applicants in the same manner successively from the lists in Group B, then Group C and then Group D.

50. With the exception of apprentices, this system of referral covers all rodmen who would work for an employer party to the Agreement. Apprentices are referred separately, without specific regard to the referral system, so that there is roughly a five to one journeyman to apprentice ratio. Although never referenced in the Agreement, trainees are similarly referred. Both apprentices and trainees are generally referred before Group D rodmen.

51. With respect to the journeyman examination, passage of which is an element of Group A and Group B status, the Agreement provides as follows:

> The Local Union, through its Examining Board, shall examine all job applicants who have not previously passed an examination conducted by the duly

constituted Local Union affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers in order to determine whether they are qualified to perform the work of the craft as a mechanic and be eligible for referral. Such examination shall be held at least every month.

52. In practice, Group A consists of members of Local 201; Group B consists of "Traveling Members", *i.e.*, members of another local union affiliated with defendant International; Group C is not used; and Group D consists of "permit workers"—rodmen who are not affiliated with the International.

53. "Group D" rodmen are required to purchase a permit to use Local 201's referral service. This permit fee (and other assessments) are approximately equal to the dues and other assessments charged to union members.

54. The purpose of the journeyman exam always has been to determine whether a man was considered eligible to join the union. At all times, the question of why a man wanted to be a member of Local 201 has been part of the examination process. The examination itself requires that a man "make application to become a journeyman member of Local Union No. 201." The rule of the Local is that an examinee must tender his union initiation fee—$300—upon passing the examination.

55. Prior to February 1971, the interview by the Executive Board—which determined whether a non-apprentice would be allowed to take the exam—consisted of questions concerning an applicant's motivation for joining the Local, his views on organized labor and his willingness to pay his dues on a timely basis. The very reason for the Open Period was to give permit workers the chance to become members of the union.

56. Theoretically, passage of the journeyman examination plus four years' experience plus, one year working

for a CCC contractor plus local residence qualifies a rodman for Group A status. However, it is union membership, conferred by passing the examination, that is the sole criterion for this preferred classification. In other words, a rodman who passes the examination becomes a Group A rodman. As the record in these proceedings shows, Group A status—union status—is a very valuable characteristic.

57. Simply put, Group A rodmen—union members—work more hours than Group D rodmen—permit workers. More hours means more money. Thus, during the period July 1, 1974 through June 30, 1975, permit workers earned, on the average, $6,600 less than the members of Local 201. Black permit workers who had accumulated at least 2150 hours by June 30, 1975—experienced rodmen—earned, on the average, almost $4,000 less than the average union member.

58. Defendants' exhibits demonstrate that there is a substantial disparity in the economic opportunities of permit workers and union members. A comparison of the average hours worked by black permit workers and by "working members" (*i.e.*, journeyman and apprentices) produces the following table:

Year	(1) Average Black Permit Worker Hours	(2) Average Working Members' Hours §	(1) as a % of (2)
1972	507	286,408/387 = 740	68.5%
1973	1082	619,150/410 = 1510	71.7%
1974	1145	664,964/434 = 1532	74.7%
1975	760	630,775/456 = 1383	55.0%
1976	531	569,283/422 = 1349	39.4%
1977	393	513,038/423 = 1213	32.4%
1978	260	430,515/377 = 1142	22.8%
1979	123	397,437/334 = 1190	10.3%
1980	162	387,119/319 = 1214	13.3%

§ The averages in this column were derived by dividing "total hours" by "total members."

59. In short, defendants' exhibits demonstrate the substantial economic opportunity represented by access to referral Group A, journeyman status, and membership in Local 201 and the International.

60. In addition to preferred referrals, only members of Local 201 and the International have the ability, when local employment is low, to work as traveling members in other locals' jurisdictions. Under the referral system, these workers also have preference over permit workers. As construction employment in the Washington area dropped during the latter part of the 1970's, this right of travel itself represented an important economic opportunity. A relatively large number of the members of Local 201 have chosen this option in recent years.

61. Thus, the evidence presented in this case shows that journeyman members of Local 201 earned more money when employment was high, and had the right to travel to other areas as a member when employment began to decline.

E. STATISTICAL DISPARITIES

62. From the creation of Local 201 until January 1971, blacks were almost totally excluded from membership in the Union. Between 1949 and 1965, only two blacks were admitted to Local 201, and one entered by transferring his membership to Local 201 from another local union.

63. As the year 1967 began, there were approximately four black members and 200 white members. Four years later, on the eve of the Open Period, there were sixteen black and 260 white members.

64. The reason why blacks were not getting into Local 201, is that one gets into the union by passing the journeyman examination and defendants have erected various barriers to that examination which have worked to exclude a disproportionate number of blacks.

65. The effect of the barriers to the journeyman examination may be properly measured by a disparate impact analysis. Such an analysis generally compares the racial composition of applicants for a position with that of those actually selected to determine whether the selection process is biased. With respect to the journeyman examination, one should compare "likely examinees" with actual examinees to determine the racial impact, if any, of the barriers to the examination. The barriers and the racial composition of the actual examinees are well-known. There is, however, some complexity in identifying "likely examinees."

66. In the simplest situation, one would identify likely examinees by identifying actual applicants for the exam.[3] However, defendants have never employed a formal application process for the examination. Professor Sheldon Haber, plaintiffs' expert in, *inter alia*, labor economics and employment solved the "likely examinee" problem with his concept of the "experienced pool."

67. Professor Haber testified that, in order to evaluate the racial impact of the procedures for selecting examinees, it was necessary to determine who were candidates for selection to take the exam. He also recognized that this examination purported to be a practical test of competency, requiring some experience at the trade. Given these guides, the Open Period standard of two years' experience became a natural starting point for the applicant pool proxy, which Professor Haber termed the "experienced pool".

> In defining the experience pool from which selections to the journeyman exam could be made, it was assumed that two years of experience was a level

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[3] *See, e.g., Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13. (1977); *Reynolds* v. *Sheet Metal Workers Local 102*, 498 F. Supp. 952, 965 (D. D.C. 1980), *aff'd*, No. 80-1378 (D.C. Cir., March 31, 1981).

> sufficient to take the exam, and from that point on that was the initial basis that we used in defining the experienced pool.

Professor Haber found corroboration for this standard in Mr. Grigsby's statement that the two-year Open Period standard was set "to try to conform with the period of time for the apprenticeship program," which Mr. Grigsby identified as being two years in length.

68. The mere determination to use a two-year standard to identify potential examinees did not, however, fully solve the problem. Professor Haber had only the union's records to rely on, and the records that indicated experience—*i.e.*, the records of the Local's Pension Fund (pension records)—showed such experience only in terms of hours worked, not years. What he did, therefore, was look at those rodmen who had been selected for the examination because they had at least two years' experience—*i.e.*, those individuals who took the exam during the Open Period. By identifying those individuals, he used the pension records to determine how many hours they had worked prior to taking the examination in order to establish an "analytical counterpart . . . to what two years experience meant."

69. Professor Haber, using the pension records, looked at the hours worked of those non-apprentices examined during the period February 1 through May 31, 1971.[4] In order to approximate the two-year standard more closely, he looked only at those Open Period examinees who had worked in both 1969 and 1970. He then com-

[4] The period February 1, 1971 through May 31, 1971 was chosen on the basis of Mr. Grigsby's description of the period, as well as the fact that no non-apprentices or non-trainees were examined after May 31, 1971. In fact, three rodmen were invited to take—but did not take—the exam under the Open Period rules on June 12, 1971, a fact not known to Professor Haber prior to the trial of this matter. This minor discrepancy does not affect the analysis of the practices of the conclusion of racial discrimination.

puted the hours that these individuals worked over those two years, and obtained three two-year averages: a white average, a black average and a "white plus black" average. Professor Haber found tha the white average was 2150 hours and that the black average was 2825 hours. In order to be "conservative"—*i.e.*, to exclude as few whites as possible while still maintaining a defensible standard—Professor Haber chose the white average, 2150 hours, as the operational equivalent of two years' experience at the trade. This 2150-hour standard therefore represented the average number of hours worked during the previous two years by white rodmen who had worked in both those years and who were selected to take the examination on the basis of two years' experience at the trade.

70. Professor Haber thus had arrived at an analytical counterpart to two years' experience—2150 accumulated hours—as a basis for his identification of "likely examinees" in a disparate impact analysis of the racial effect of the Union's barriers to the examination. He then added one more qualification: any rodman who had actually been examined—regardless of hours—was, logically enough, taken to be a "likely examinee." Professor Haber referred to these "likely examinees" as the "experienced pool." Thus, the "experienced pool," for a given time period, consisted of those rodmen who: —had accumulated 2150 hours before the end of the period, or actually examined during the period; and—at some time during the period were not members of Local 201 (*i.e.*, were examined, if at all, on or after the first day of the given period).

71. Professor Haber's analysis demonstratad [sic] that, at least since 1967 and continuing through the date of the filing of the complaint in this matter, every procedural barrier to the examination erected by the defendants—with the dramatic exception of the Open Period—has prevented a disproportionate number of blacks from tak-

ing the examination. Professor Gastwirth, plaintiffs' expert in statistical analysis, demonstrated that these disparities were, without exception, statistically significant. In addition, during *all* periods—including the Open Period—Professors Haber and Gastwirth demonstrated that the procedural barriers barred or delayed the entry of a statistically significant proportion of blacks to membership in the Local and International, and thus to Group A referral status.

72. As discussed above, prior to February 1, 1971, there were two ways to take the journeyman examination: the Apprenticeship Program and the "Executive Board Procedure." During the period January 1, 1967, to January 31, 1971, 55.8 percent (63 of 113) of the experienced whites were examined, while only 15.9 percent of the experienced blacks were tested.[5]

73. Professor Gastwirth testified to the statistical significance of this disparity. He assumed that experienced blacks and whites in fact had equal access to the examination during this period, *i.e.*, that the 55.8/15.9 percent disparity was not indicative of the true "long run" access of blacks and whites. Working on this assumption, and applying the statistical test for the difference between two proportions, Professor Gastwirth found that the probability of such a gross disparity occurring due to chance was less than one in a million. Statistically, this probability translates to a significance level of .000001, based on a difference of 5.62 standard deviations.

74. The level of statistical significance observed during this period exceeds the .05 (1.96 standard deviations) generally required in disparate impact cases.

75. During the period February 1, 1971 through June 12, 1971, there were two ways to qualify to take the

[5] Among the experienced blacks not examined during this period were plaintiffs Berger, Kirkland, Bellamy and Tucker.

journeyman examination: the Apprentice Program and the "Open Period" procedure. Unlike the procedures extant in any other period, those in effect during this time resulted in nearly identical rates of access to the examination by experienced black and white rodmen.

76. During this period, blacks were still unable to attain union membership representative members. Ordinarily, very few examinees fail to pass the exam. However, during the single period when blacks were allowed equal access, blacks failed at twice the rate of whites. Specifically, 70.6 percent (24 of 34) of the white examinees, but only 35.3 percent (12 of 34) of the black examinees passed.[6]

77. The probability that the difference in pass rates from February 1, 1971, through June 12, 1971, would arise if chance were the cause is less than 1 in 40 (significance level .024), the difference being 2.25 standard deviations.

78. Plaintiffs have demonstrated that the examination administered between February 1, 1971, and June 12, 1971, prevented a significantly higher percentage of blacks than whites from attaining union membership and from entering Referral Group A. The use of such a test *prima facie* violates Title VII.

79. From June 13, 1971, through October 21, 1972, 33.3% (24 of 72) of the "experienced" whites, but only 9.2% (7 or 72) of the "experienced" blacks, were selected to take the examination. The probability that this disparity would arise due to chance is less than one in 1,000, the difference being 3.4 standard deviations.

80. Similarly, the percentage of experienced blacks selected to take the exam during the three years prior to the filing of this lawsuit was substantially lower than

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[6] Among the experienced blacks who did not pass this exam were plaintiffs Kirkland and Bellamy.

the analogous percentage for experienced whites. From October 22, 1972, through October 21, 1975, 33.6% (49 of 146) of the experienced whites, but only 16.9% (21 of 124) of the experienced blacks took the journeyman examination.[7] The probability that the disparity in the percentages of whites and blacks selected to take the exams would arise by chance is about three in 1,000 corresponding to 2.96 standard deviations.

81. Since the differences between the percentages of experienced whites and the percentages of exprienced blacks examined from June 13, 1971, to October 21, 1972 and from October 22, 1972 to October 21, 1975 far surpass the five percent significnce [sic] level, plaintiffs have demonstrated that the most recent requirements for qualifying to take the journeyman examination *prima facie* violate both Title VII and § 1981.

82. As a result of the above practices, for each time period analyzed, the percentage of black experienced workers gaining admission to Local 201 and the International has been substantially less than the percentage of white experienced workers attaining such membership. These disparities are demonstrated as follows:

Period	Exp'd	New Members	Access Rate	Exp'd Pool	New Members	Access Rate
1-1-67 to 1-31-71	113	60	53.1%	88	12	13.6%
2-1-71 to 5-31-71	68	20	29.4%	77	12	15.6%
6-1-71 to 10-21-72	72	24	33.3%	76	7	9.2%
10-22-72 to 10-21-75	146	49	33.6%	124	19	15.3%

[7] Among the experienced blacks not given the opportunity to take the examination during this period were plaintiffs Kirkland, Tucker, Berger, Bellamy, and Jackson.

The disparities for each period are statistically significant at the five percent level: for the period January 1, 1967, through January 31, 1971, the probability that the difference would arise by chance is less than one in one million (5.76 standard deviations); for the second period, the probability is about one in forty (2.23 standard deviations); for the third period, the probability is approximately one in 1,000 (3.25 standard deviations); for the fourth time period, the probability is also about one in 1,000 (3.3 standard deviations). Thus, plaintiffs have demonstrated that, since 1967, all of the rules used by the defendants for selecting examinees have discriminatorily prevented blacks from gaining membership in Local 201 and the International and from qualifying for Referral Group A. Such a showing is sufficient to establish a *prima facie* case that defendants have violated both Title VII and § 1981.

83. In order to rebut plaintiffs' *prima facie* showing, defendants must do more than just point out potential sources of error. Rather, defendants must demonstrate that the claimed error is systemaatic, [sic] that it actually biased the results, and that the bias was sufficiently extensive that it would affect the validity of plaintiffs' demonstration of discrimination. Defendants failed to satisfy their burden of demonstrating that the claimed errors would affect the finding of discrimination. Defendants have thus failed to rebut plaintiffs' *prima facie* showing of discrimination.

84. Defendants have maintained a predominantly white membership by limiting the number of rodmen admitted to the union. During fiscal year 1975 Local 201 referred 394 journeymen members and 456 non-union permit workers for work as rodmen. In spite of the large number of permit workers in the trade, and even though the "experienced" non-union pool included 281 rodmen, only 76 apprentices and trainees were selected to take the journeyman examination during the three years prior to the filing of this lawsuit.

85. Since the end of the Open Period, rodmen under the age of 31 have been unable to qualify to take the journeyman examination unless and until they complete the Apprenticeship Program. Admission into this program is conditioned on several factors. Since 1950, applicants have been required to have high school diplomas.

86. As a result of this discriminatory entrance requirement, the percentage of blacks in the apprenticeship program has been disproportionately low. According to census data for 1970, 13.8% of the white males in the Washington SMSA had not graduated from high school. By comparison, three times as many blacks—38.3%—had not completed four years of high school. For the years 1976 through 1979, a similar disparity appears in the male population aged 20 to 29 in the Washington SMSA. (16.8% of whites, but 25.7% of blacks, failed to complete high school).[8]

87. The individuals actually admitted to the apprenticeship program were disproportionately white. From 1970 to 1979, 82 minorities and 245 whites participated in the Apprenticeship Program. Thus, the minority participation rate was 25.1%.

88. In order to determine whether this rate is disproportionately low, it is necessary to determine the black availability rate, *i.e.*, the black percentage of the individuals who would have become apprentices in the absence of any policies that discouraged them from doing so. Because interested persons who did not have high school diplomas were not even given applications, complete applicant information was not available. As a result, plaintiffs could not determine the black availability rate on the basis of actual applicant date [sic], but instead had to turn to other sources to estimate the racial com-

[8] Plaintiffs Bellamy, Lewis, Kirkland and Tucker were working out of Local 201 at a time when they were under 31 years of age, and none had a high school diploma.

position that one would expect to find among persons seeking to enter the apprenticeship program. Plaintiffs presented two such estimates: one based on the individuals first appearing at the union hall during fiscal years 1973, 1974 and 1975—the "new entrant model"—and another based on census data—the "commuter model".

89. The "new entrant model" is an estimate of the black availability rate for the apprenticeship program based on the racial composition of the individuals who first entered the trade from July 1, 1973, through June 30, 1975. The figure gives a good indication of the racial composition of the part of the labor force that would be interested in entering a relatively low-skilled trade such as the rod trade. Moreover, this figure is based on actual data, and is therefore somewhat more reliable than estimates based on figures that encompass a population as large as that of the Washington SMSA. Using this analysis, Professor Haber determined that there were 199 black and 242 white "new entrants", and thus blacks constituted 45.1% of the "new entrants" during the period studied.

90. The "commuter model", the second estimate of black availability for the apprenticeship program, is based on a model Professors Haber and Gastwirth described in their article, "Defining the Labor Market for Equal Employment Standards" (*Monthly Labor Review*, March 1976). The premises of the model is that, in estimating the percentage of an employer's labor pool that is expected to be black, the data should be refined to reflect the commuting patterns of workers.

91. In making this computation, Professor Haber began by identifying the sector of the population that he felt would be interested in seeking employment in a blue collar construction occupation such as the rodman trade. He selected the male population with twelve years of education or less, because census data indicated that few

people with more education would be likely to enter such a trade.

92. Because census data for the 18 to 30 years old population with twelve years of education or less was not broken down by area of residence (*i.e.*, District of Columbia versus the suburbs), Professor Haber was forced to use the population 25 years of age or older with twelve years of education or less as a proxy for the younger age group. He then refined these figures, following the model presented in this article, to reflect the commuting patterns of these workers. He determined that, of the males 25 years of age or older with twelve years of education or less who work in the District of Columbia, 48.3 percent were black. Professor Haber further determined that, of those individuals who worked in the suburbs, 21.5 percent were black. Professor Haber then further refined these figures to reflect the actual locations of rodmen jobs during fiscal years 1973, 1974 and 1975. These computations resulted in an estimate of the black availability rate for the apprenticeship program of 42.2%.

93. Thus, plaintiffs have introduced two estimates of the expected rate of participation of black workers in the apprenticeship program. One figure, based on the "new entrants" into the trade during fiscal years 1973, 1974 and 1975, was 45.1%. The other standard, based on census data and the commuting model of Professors Haber and Gastwirth, resulted in a standard of 42.2%.

94. Blacks constituted only 25.1% of the apprentices from 1970 through 1979. The differences between the expected rates of black participation and the actual rate are statistically significant—the 42.2% standard is significant at 6.27 standard deviations, the 45.1% figure is significant at 7.28 standard deviations.

95. Thus plaintiffs have established a *prima facie* case that the high school diploma requirement has un-

lawfully discriminated against blacks on the basis of race.

96. Defendants have presented a number of challenged to the "new entrant" standard advanced by the plaintiffs. In order to rebut plaintiffs' showing, defendants must demonstrate that the alleged error is systematic, that it actually biased the results, and that such bias is sufficiently extensive to affect the validity of plaintiffs' showing of discrimination.

97. Defendants have failed to demonstrate that the various claimed errors in the computation of the "new entrant" standard would affect the results in a systematic and biased fashion sufficient to call into question the finding of discrimination. They have therefore failed to satisfy their burden of rebutting plaintiffs' *prima facie* showing that the high school diploma requirement discriminated against blacks.

98. Plaintiffs introduced a second estimate of the black availability rate for the apprentice program based on census data and the commuter model of Professors Gastwirth and Haber. Although this figure was based on sources of information totally different than those underlying the "new entrant" standard, it resulted in a criterion that was only slightly different than the "new entrant" figure. This figure therefore corroborates the validity and reliability of the 45.1% standard. As the previous section demonstrated, defendants failed to rebut plaintiffs' *prima facie* case that the 45.1% standard proves that the high school diploma requirement violated the civil rights of qualified blacks.

99. Defendants have introduced no evidence of errors or inaccuracies in the commuter model standard sufficiently systematic, biased or extensive to question the validity of the showing of discrimination.

100. Defendants have failed to rebut plaintiffs' *prima facie* showing that the high school diploma requirement

discriminated against blacks on the basis of race. This requirement therefore violates both Title VII and section 1981.

101. Before June 1971, a disproportionate number of blacks of all ages were generally unable to gain admission to the union either because they were denied the opportunity to take the journeyman examination or because they failed the test. As a result of this discrimination, the pool of older "experienced" non-union rodmen during the three years prior to the filing of this action was predominantly and disproportionately black: while whites constituted 72.1% of the "experienced" non-union rodmen under the age of 31, blacks comprised 72.8% of the "experienced" non-union workers age 31 or over.

102. After June, 1971, this predominantly black group of rodmen was confronted with yet another barrier to entering the union: the requirement that workers 31 years of age or older complete a two-year training program in order to qualify for the opportunity to take the journeyman examination. Plaintiffs Berger, Bellamy, Jackson, and Kirkland encountered this barrier and eventually entered the training program in order to gain access to the exam. Plaintiff Kirkland was unable to gain admission to this program until September 1977—after working 12 years out of Local 201. Plaintiff Tucker has never been able to gain admission to the program.

103. The required completion of the training program is an illegal detour that has barred certain of the plaintiffs and the members of their class from becoming members of Local 201.

104. The journeyman exam prerequisite of completion of the training program, which was established in June, 1971, similarly exacts an additional penalty for "experienced" black rodmen who had been denied union membership prior to June, 1971. These workers were

confronted with a reduction in wages, and, in addition, were required to participate in an unnecessary program that worked to delay their access to the journeyman examination for: (a) the period between June, 1971 and the date of admission to the program, and (b) the length of time spent in the program. By requiring black rodmen with thousands of hours of experience to enter and complete this program as a prerequisite to taking the journeyman examination, defendants perpetuated the denial of equal employment opportunities to these experienced black rodmen. This unlawful practice forced these workers to participate in a training program in order to take the union admission examination.

105. The costs of participation in the training program in fact deterred a number of experienced black rodmen 31 years of age or older from participating in the program. Only 17.3% of the "experienced" black workers 31 years of age or older participated in the training program during the three years prior to the filing of this lawsuit. Those who did not—approximately five out of six—had no route to journeyman membership. These figures show that the required participation in the training program in order to take the journeyman examination is another discriminatory impediment faced by experienced black rodmen seeking journeyman membership in Local 201 and the International.

106. Even for those black rodmen who chose to enter the training program, this route to the journeyman examination was a far less effective means of gaining an opportunity to take the journeyman examination than was the Apprenticeship Program—a program which they were foreclosed from entering by the high school diploma requirement and the maximum age rule. From 1970 through 1979, 52.9% of the individuals entering the apprenticeship program successfully completed the program. By comparison, the completion rate for the training program during the years 1972 through 1980 was

38.5%. The differences in these completion rates are statistically significant.[9]

107. A comparison of the racial compositions of the Apprenticeship Program and the Training Program further illustrates the discriminate effects of defendants' current prerequisites for taking the journeyman examination. As Rodmen Exhibit 69 shows, 20.8% of the apprentice completions since 1970 have been minorities, while 85.5% of the training program completions have been minorities. The disproportionately low rate of black participation in the apprenticeship program—the more effecitve route into the union—further substantiates plaintiffs' *prima facie* showing.

108. In short, defendants have created two racially distinct "tracts" leading to the journeyman examination: a predominantly white apprenticeship "track" and a predominantly black trainee "track". The training program "track" has been a significantly less effective means of qualifying to take the examination. Thus, the bifurcation of the pool of experienced workers according to age, and the creation of two parallel "preexamination" program, has *prima facie* discriminated against black rodmen, and has unlawfully denied them journeyman membership in the union and placement in the top referral group under the collective bargaining agreement between the union and the CCC. This disparity violates both Title VII and § 1981.

109. As a result of these various practices that discriminated against black rodmen, these workers have consistently received, on the average, significantly fewer hours of work than have white rodmen. This disparity is made clear from an analysis of the figures presented in Rodmen Exhibit 62. These figures produce the follow-

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[9] If one introduces a two-year lag into these figures, as suggested by defendants' expert, the apprenticeship program completion rate is slightly higher, 53.8%.

ing comparison of the average hours of black and white rodmen for the period 1970 through 1980:

Comparison of Average Annual Hours
Worked by Black and White Rodmen

	Average Hours —Blacks *	Average Hours —White **	(1) As a Percentage of (2) †
1970	1370.7	1477.4	92.8%
1971	1288.1	1480.5	87.0%
1972	571.2	707.9	80.7%
1973	1103.7	1355.1	81.4%
1974	1108.5	1335.6	83.0%
1975	981.1	1166.2	84.1%
1976	928.6	1208.6	76.8%
1977	902.5	116.6	80.8%
1978	834.0	1128.5	75.7%
1979	1035.0	1194.4	86.7%
198	746.2	1139.5	68.5%

As this table demonstrates, in every year from 1970 through 1980, blacks received subsantially fewer hours of referrals than did white rodmen. This table further demonstrates that, as compared with whites, blacks actually fared slightly worse during the latter portion of the 1970's than they did during the first few years of that decade. Finally, this table demonstrates that whites were still receiving a disproportionate number of hours

* These figures are derived by dividing the total hours worked by blacks by the total number of black workers. See Rodmen Exhibit 62, columns 4 and 7.

** These figures are derived by dividing the total hours worked by whites by the total number of white workers. The total white hours were computed by subtracting the total hours for all minorities from the total hours for all workers. The total number of white workers equals total workers minus minority workers. See Rodmen Exhibit 62, columns 5 and 6. Thus, the formula for computing the average white hours is as follows:

$$\text{Average white hours} = \frac{\text{total hours-minority hours}}{\text{total workers-minority workers}}$$

† This figure is computed by dividing the average hours of blacks by the average hours of whites, and then multiplying by 100.

seventeen years after the passage of Title VII. These figures, which are wholly based on defendant's statistics, provide further and graphic evidence that defendants' continued discriminatory practices have deprived these workers of substantial economic opportunity in violation of Title VII and Section 1981.

RETALIATORY CONDUCT BY DEFENDANTS

110. Defendants or other agents took relatiatory actions against certain of the named plaintiffs following their filing of charges with the EEOC or their participation in this suit.

111. Plaintiff Randolph Jackson was laid off in January 1975, after charges of discrimination had been filed with the EEOC, and was told by the superintendent of the job site that he had orders from Mr. Vermillion to fire him.

112. Plaintiff Tommy Kirkland's supervisor, Ray Coda, indicated his knowledge of Kirkland's participation in the lawsuit. A week later, Mr. Coda told Mr. Kirkland that he thought he would have permission to fire him, and several weeks later Mr. Kirkland was indeed laid off, although other rodmen were brought in to perform his job.

113. Plaintiff Jesse Berger heard Tommy Gilmer, then business agent for Local 201, state at a union membership meeting in February 1981 that he was going to make it hard on those who filed this suit.

114. Plaintiff Van Edward Lewis was told by Mr. Gilmer that he would not provide him with an application for the training progrm [sic] until he agreed to drop the discrimination charges. After indicating his willingness to do so, Mr. Lewis was given an application, although he did not drop his charges.

115. Plaintiff Ernest Bellamy, before becoming a party to this action, wrote a letter to defendant International

in November, 1974, complaining of Local 201 membership practices. Mr. Bellamy testified that he later "exchanged words" with Mr. Vermillion about the letter, and that Mr. Vermillion stated that Bellamy would never be referred again. Although Mr. Vermillion did not effect this threat, Mr. Bellamy soon found himself working at reduced wages, purportedly in accordance with the rules of the training program, despite the fact that Mr. Bellamy had received full journeyman wages in previous years in the training program.

F. *The Role of the International*

116. An examination of the Constitution of the International establishes the pervasive authority of the International over the affairs of its affiliated local unions such as Local 201. Indeed, the Constitution grants the International the power to control virtually all aspects of the structure and operation of its local unions. In a word, the Constitution identifies and treats affiliated local unions as "subordinate" bodies.

117. Local unions become affiliated with the International through a charter issued by the International and the International retains the authority to suspend or revoke the charter or to place local unions under "direct International supervision" for conduct detrimental to the International's interests. The International Constitution contains a provision entitled "Constitution Governing All Local Unions" (Art. XXVI). That provision contains more than 15 pages of detailed instructions, ranging from the specification of the officers which local unions must have, and their duties, to directions regarding the order of business and rules of conduct to be followed at meetings of the local unions. Not only has the International written and maintained the Constitution of its locals within its own Constitution, but also local unions must submit their By-laws to the International for approval,

and such By-laws do not become effective until approval of the International is received. (Art. XXI § 4.)

118. The Constitution of the International also establishes the membership requirements for all local unions, requiring, *inter alia*, that "[t]o be admitted to membership in any local union of the International Association one must be a practical workman versed in the duties of some branch of the trade . . . of good moral character and competent to demand standard wages." (Art. II, § 2.) If local unions fails "to enforce this section to the letter . . . all benefits of such Local and its members will be suspended for thirty days" and, if such failure persists, the local's charter will be forfeited. (Art. II, § 4.) The Constitution prescribes the procedures by which rodmen can become local, and at the same time International, union members.[10] Each local union is required to have "an Examining Committee to examine the qualifications of candidates seeking admission as members of a local union of this body." (Art. XXI, § 2.) The Constitution further prescribes the membership of the Examining Committee, the frequency of its meetings and other details regarding its operation. (Art. XXVI, § 8.) The International must approve the membership of applicants and reviews the reasons for rejection of any applicant. (Art. XXI § 2).) It may also expel members. (Art. II, § 5.)

119. The International receives a portion of the initiation fee for new members and has the authority to change the amount of the fee. (Art. XIX, §§ 1-2a.) The International issues membership cards and receives monthly dues from all members. (Const., Art. XIX, §§ 5-8; Art. XVI.)

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[10] A rodman becomes a member of the International by becoming a member of a local union. It is not possible to be a member of the International without becoming a member of a local union. Thus, the membership and admissions policies of Local 201 are in fact the membership and admissions policies of the International.

120. The International Constitution sets forth detailed requirements for operation of apprenticeship programs by local unions. Local unions are required, *inter alia*, to establish such programs in conformity with "Standards of Apprenticeship" adopted by the International. (Art. XXIII, §§ 1-2.) The Constitution further prescribes the requirements for entry into the Apprenticeship Program. (Art. XXIII, § 3.)

121. The International also was instrumental in establishing the National Ironworkers Employment Training Program, pursuant to a government contract. This program was allegedly designed to increase minority participation in the iron work trade. Mr. Lyons testified that the International decided against the alternative of increasing minority participation in the Apprenticeship program and opted for a separate training program in order to avoid "diluting" the Apprenticeship Program and thereby developing "a bunch of second-class ironworkers." Local training programs are supervised by the national program whose president, William Hardesty, is also the International's Director of Apprenticeship and Training.

122. The Constitution grants the International's General President, the General Executive Board and the General Executive Council broad powers to effectuate International control over local union affairs.

123. The General President has the duty to "organize or cause to be organized, local unions". (Const., Art. IX, § 7.) The Constitution further provides that the General President:

> . . . shall, whenever in his judgment subordinate bodies or the members thereof are working against the best interests of the International Association, have power to order said body to disband or cease such practices under penalty of revocation of charter.

"[W]ith the approval of the General Executive Board," the General President has "full power to effect settlement of any strike." (*Id.*, § 14). Moreover, he (*Id.*, § 18)

> . . . shall have authority to investigate, personally, through the General Auditor and/or International representative, the affairs of local unions and the administrations of all General and Local Officers; and all books, records, accounts, securities and property in the custody of any such officer or Local Union shall be made available for examination by the General President, the General Auditor, or other persons selected by the General President for the purpose. For the purpose of carrying on such investigations, as well as for other purposes within the purview of his general supervisory powers, the General President may employ and designate certified public accountants to make examinations and audits.

Finally, the General President has the power (*Id.*, § 10)

> . . . to decide all points of law and to suspend any subordinate body for violation of the Constitution and laws.

124. The General Executive Board, composed of the General President, the General Secretary and one other officer, has authority "to fix by general orders from time to time the system of bookkeeping and accounting to be employed by local unions" (Art. XII, § 10) and to "provide rules and regulations governing all local unions in the employment of our members or work for interstate employers," (*Id.*, § 11). More significantly, Article XII, Section 7, provides:

> The General Executive Board shall have the power to place any local union or other subordinate body of the Association under direct International supervision whenever in its judgment such action is necessary for the purpose of correcting corruption or

> financial malpractice, assuring the performance of collective bargaining agreements or duties of a bargaining agent, restoring democratic procedures, *or otherwise carrying out the legitimate interests of the International Association.* (Emphasis supplied.)

125. The General Executive Council, composed of the General President, the general Secretary, the General Treasurer and the nine General Vice Presidents of the International, rules on appeals from the General Executive Board. (Art. XIII, § 6). With specific reference to the Council's authority over local unions, Article XIII, section 5 provides:

> The General Executive Council shall formulate such organizing plans or policies as they may consider in the best interest of the International Association and when such plans or policies have been adopted by the General Executive Council it shall be mandatory that such plans or policies be observed by all Local Unions and the failure or refusal of any Local Union to cooperate with the International Association in such efforts shall be sufficient cause for the revocation of the charter of such Local Union, and the General Executive Council may, should it be deemed best, establish another charter in that territory.

126. The International also controls the collective bargaining process of its local unions. The Constitution prescribes in mandatory language the steps in that process, including submission to be International, upon request, of the local union's initial bargaining proposal, and requires local unions to obtain approval of the General Executive Board before commencing negotiations and finalizing collective bargaining agreements. (Art. XXI, § 29.) The Constitution provides that the International "will aid and assist its local unions and chartered bodies in drafting and negotiating suitable and workable agreements and working rules." (*Id.*) Following negotiations (*id.*, ¶ A),

> . . . [t]he final draft of all new agreements and/or the final draft of all amendments to existing agreements shall be submitted to and approved by the General Executive Board before same is signed by the officers of the local union, and any such agreements or amendments which have not been approved by the General Executive Board shall have no binding force or validity.

The International retains power to enforce these provisions and, once an agreement is entered, the International enforces compliance with its provisions. (Art. XXI, § 29, ¶ A.)

> Outside Local Unions which fail or refuse to comply with the provisions of this paragraph or Paragraph C of this Section or that violate an agreement after approval of same by the General Executive Board will be subject to the forfeit of their charter, and the officers or members of Outside Local Unions violating the provisions contained in this paragraph or Paragraph C of this Section shall be subject to charges and, after trial, such penalty as the General Executive Board may deem proper.

Significantly, "[l]ocal Unions are not granted the power, and are forbidden, to call any strike involving the work of any fair contractor, or cause *any* stoppage of work, without first securing the sanction and approval of the General President." (*Id.*, § 28, emphasis in original.)

128. The facts regarding the International's responsibility for discriminatory action by Local 201 are not limited to the numerous provisions of the International's Constitution which confirm the International's authority to control virtually every aspect of Local 201's structure and operations. The International has, in fact, exercised its authority to direct Local 201 action with respect to the central issues in this lawsuit, including the admission of rodmen to membership.

129. Plaintiffs have been deprived of or delayed in obtaining union membership because of their race. One principal means of preventing or inhibiting blacks from attaining union membership has been the manner in which the test or membership has been administered.

130. On at least two occasions, the International has intervened to prescribe the test which Local 201 should employ. In 1967, International representatives visited Local 201, evidently to deal with questions of admiissions [sic] to membership and racial discrimination. Mr. Hardesty reported to Mr. Lyons regarding that meeting. He stated:

> As has been our practice in the past with other Local Unions, we presented Local 201 with form letters, and seven (7) written examinations and discussed at length the reasons why they should adopt a standard procedure for the acceptance of non-members, as well as why non-members should be accepted. Numerous questions were asked concerning the execution of Federal Reporting Forms EEO-2 and EEO-3 which were answered to the satisfaction of all present.

131. Reresentatives of the International visited Local 201 again in January 1971 and met with its Executive Board. The minutes indicate that "the Executive Board was instructed . . . as per General President John H. Lyons' instructions to notify all men working on permit, by registered mail, to appear before the Examining Board to be given the test. We were instructed to examine thirty applicants per month until all have been examined. Any man that passed the test and pays the initiation fee is to be taken in the Union as a member."

132. The apparent reason for the International's intervention was to attempt to prevent "future litigation, such as occurred in Local 1, Chicago, Illinois, in Local 426, Detroit, Michigan, in Local 86, Seattle, Washington, and in other locals throughout the country." The

International representative followed up the meeting with Local 201 with a form report to Mr. Lyons indicating that he had "no reason to believe that the instructions left will not be followed." The International representative also sent Local 201's Business Agent a detailed letter after the meeting listing certain "suggestions" and numerous "instructions" regarding Local 201's referral practices, testing procedures and treatment of "non-members".

133. There is no doubt that Local 201 carried out its instructions. The Business Agent in 1971, Ronald Vermillion, explainied what transpired in his deposition:

> Q. You stated that the International prepared the written questions [for the admission test]. Is that what your testimony was?
>
> A. That's right.
>
> Q. How do you know that the International prepared the written questions?
>
> A. Well, to the best of my knowledge, December of '70 or January of '71 two general organizers from the International appeared at our executive board meeting, informed us that they were going all over the country and informing locals to give all these people working on a permit a test to become members of the association. It was a very lengthy meeting and a lot of discussion. We were told, more or less, that we do it or the International would do it and we wouldn't get any of the initiation fee, so to keep our own autonomy and to get $15,000 or $20,000 whatever it would be from initiation fees, we decided to concur with them.
>
> We didn't have much choice in the matter, being as they were the International we concurred or they would have done it themselves.

Q. In other words, they would have given people tests and admitted them to the International?

A. Yes; and kept the initiation fee themselves.

Q. They would send these men to you to be referred out to work as members of the International?

A. They would just let them in the Local as members.

Q. They would put them in Local 201?

A. Yes.

The active role played by the International in establishing the tests and other requirements relating to union membership, which was confirmed in the testimony at trial of its General President, John Lyons belies any suggestions that the International lacked or did not exercise authority with respect to the racially discriminatory admission policies of Local 201.

134. The International has also exercised significant control over the Apprenticeship and Training Programs. One must be a member of the Apprenticeship or the Training Program in order to become a union member. The International prescribes the structure and operation of both programs. It can impose requirements on these programs to ensure that they are not used, as they have been in this case, to perpetuate racial discrimination. In particular, Mr. Lyons, himslf, [sic] played the crucial role in dictating the high school graduation requirement for the Apprenticeship Program.

135. The International also was instrumental in establishing the referral system employed by Local 201 and other local unions. Mr. Grigsby acknowledged that the referral system was established because "it was felt by the International that some kind of a, some kind of system, that some kind of documented system had to be used."

136. The International has not, moreover, been unaware of the racial imbalance in Local 201 and claims of racial discrimination. In 1974, Mr. Hardesty wrote local unions, including Local 201, stating that "[o]nce again, it is necessary for me to seek your assistance and cooperation in providing me with accurate information concerning the make-up of your Local Union." He enclosed a chart on which local unions furnished statistics regarding their racial compilation. Local 201 reported that less than ten percent of its members were black.

137. A number of black iron workers have complained to the International regarding discrimination by Local 201. In each instance, the International conducted an investigation of the complaints. Thus, the International has acknowledged that it has the responsibility to deal with racial discrimination against black iron workers who seek membership in or referral from Local 201. Indeed, General President Lyons has explained that he had appointed Mr. Hardesty to be his "man on racial discrimination," "assigned to be the coordinator of every matter relating to racial or discriminatory practices of the local unions." Thus, "the instructions were that whenever a local union gets into any problem relating to equal employment the question goes from the local union directly to International headquarters to be handled by Mr. Hardesty."

138. The International, in addition, has exercised the control contemplated by its Constitution with respect to collective bargaining and strikes by Local 201. In 1973, for example, the International refused to grant Local 201 permission to strike and directed it to discontinue an unauthorized work stoppage. In 1974, the International assumed control of collective bargaining negotiations and, ultimately, the General Secretary of the International executed the agreement on behalf of Local 201. After considerable correspondene [sic] with Local 201, the International refused permission to strike in 1975.

According to Michael Byorick, who has been chairman of the negotiating committee for the Construction Contractors Council, on behalf of employers, the International has intervened to conclude negotiations with respect to the last three collective bargaining agreements. He testified:

> Q. You reached impasse on the last three agreements in your negotiations between CCC and the Local and it was necessary for International to come in; is that your testimony?
>
> A. Right.

Mr. Byorick explained that in negotiating the collective bargaining agreement in effect in 1977, a representative from the International, Robert Cooney, "sat together" with representatives of Local 201 and theh [sic] CCC and "we settled the contract." [11]

139. The International has, in short, exercised exactly the kind of pervasive control over the affairs of Local 201 which the Constitution authorizes and contemplates.[12] The fact that this control has extended to the very matters at issue in this litigation emphasizes the inappropriateness of the suggestion that the International has no authority over or responsibility for the activities of Local 201.

140. The CCC is the agent of employers in the rodman trade in collective bargaining and other dealings with

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[11] Mr. Byorick also testified that the International was sometimes called by employers to settle disputes between them and Local 201 with respect to particular jobs.

[12] The records of the International also indicate that it has exercised the kind of day-to-day control over Local 201's affairs which is contemplated by the International's Constitution. It has approved By-Laws. It has also ruled on such matters of detail as the imposition of an assessment of $15 per member and increases to the expense account of the Business Agent.

hLocal [sic] 201. In its answer, the CCC admitted that it "has represented and continues to represent its members in collective bargaining agreement negotiations with Local 201, and, on behalf of its members, is a party to a presently effective collective bargaining agreement with Local 201." [13] Under the collective bargaining agreement negotiated and entered into by the CCC, members of the CCC obtain their rodman employees through Local 201's referral system. Thus, the CCC controls access to employment on unionized rodman jobs.

141. The CCC appoints trustees to the Training Program, the Apprenticeship Committee. Local 201 appoints an equal number of representatives. Prospective members of Local 201 and the International must serve as a trainee or an apprentice in order to obtain union membership. Thus, the Training Program and the Apprenticeship Program control access to union membership. The trustees have general supervisory responsibility for the operations of the Training Program and the Apprenticeship Program, including the duty to ensure adequate participation by minorities, particularly in the Training Program.

142. The CCC knew or should hae [sic] known of the discriminatory impact of the referral system, which has been part of collective bargaining agreements since 1959, and of the other racial discrimination which has occurred. CCC's participation in the Training Program and the Apprenticeship Program is sufficient itself to justify the finding that the CCC knew or should have known of the rcial [sic] discrimination. Moreover, there are other

[13] The CCC first negotiated a collective bargaining agreement with Local 201 in 1949. Employers who were not members of the CCC also could, and did, become signatories to the collective bargaining agreements negotiated by the CCC. Recently, the CCC has altered its method of operations so that, presently, members or non-members who wish the CCC to negotiate with Local 201 for them must give specific authorization.

grounds on which to infer that the CCC knew, when it negotiated collective bargaining agreements with Local 201, that the referral clause had the effect of implementing and perpetuating racial discrimination.

143. The CCC's 1971 Steering Committee file, complied [sic] to assist in negotiations with various locals, including Local 201, contained a memorandum suggesting that the referral system employed by a sister ironwork union. ???? [sic] Minutes of the bargaining strategy meeting indicated that the CCC concluded that the referral clause of the Collective argaining [sic] agreement needed to be completely revised. In fact, a revision to the collective bargaining agreement, which completely deleted the referral clause, was prepared and submitted to Local 201. However, Local 201 rejected the proposed revision, and the CCC agreed to a collective bargaining agreement which contained the referral clause.

144. On these facts, it is proper to infer that, in the 1971 bargaining, the CCC: (1) was aware that the referral clause had a discriminatory impact; (2) took notice of such discrimination in its collective bargaining; (3) ultimately agreed to retention of the clause; and (4) thus, knowingly participated in continuation of racial discrimination.

145. CCC considered itself to have a responsibility to ensure that it was not a party to a collective bargaining argument which permitted or perpetuated racial discrimination.

II

1. Local 201 is a union and a labor organization engaged in an industry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000e(b), (e), and is a person within the meaning of 42 U.S.C. § 1981.

2. International is a labor organization with headquarters in the District of Columbia, engaged in an in-

dustry affecting commerce, as defined in Title VII, 42 U.S.C. § 2000(b), (e), and is a person within the meaning of 42 U.S.C. § 1981.

3. CCC is an incorporated employer association whose members are contractors and subcontractors engaged in bridge, structural and oranamental iron work in the Washington Metropolitan Area. CCC is subject to the provisions of Title VII, 42 U.S.C. § 2000e *et seq.*, and is a person within the meaning of 42 U.S.C. § 1981.

4. Apprenticeship Committee is a joint labor-management committee, as defined in Title VII, 42 U.S.C. § 2000e (b), (d), and is a person within the meaning of 42 U.S.C. § 1981.

5. Training Program is a joint labor-management committee as defined in Title VII, 42 U.S.C. § 2000e(b), (d), and is a person within the meaning of 42 U.S.C. § 1981.

6. This action has been brought pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. This Court has jurisdiction pursuant to 42 U.S.C. § 2000e(2) and 28 U.S.C. § 1343. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 2000e(f)(3). Plaintiffs have exhausted their administrative remedies.

7. The named plaintiffs represent a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, composed of: (1) all black persons who have been or might be excluded from membership in Local 201 and/or the International or from participation in the Apprenticeship or Training Program by the racially discriminatory practices of the defendants; and (2) all black persons who have been or might be discouraged by the known racially discriminatory practices of the defendants from applying for membership in the International and/or

Local 201 and/or applying for admission to the Apprenticeship and/or Training Programs.

8. Title VII forbids employers, labor organizations, and apprenticeship and other training programs from using race, color or national origin as factors in employment or employment-related decisions. Title VII provides in relevant part, 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer
>
> > (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applications for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . .
>
> (c) It shall be an unlawful employment practice for a labor organization
>
> > (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
> >
> > (2) to limit, segregate, classify its membership or applicants for membership, or to classify of fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment

> opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. . . .
>
> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or otherwise training or retaining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training, 42 U.S.C. § 1981.

9. Section 1981 forbids discrimination on the basis of race, and provides a federal remedy against such discrimination in private employment. Section 1981 provides, 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoined by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

10. In demonstrating a violation of Title VII, plaintiffs bear the burden of establishing a *prima facie* case. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-31 (1971). Once a *prima facie* case has been established, the burden of persuasion shifts to defendants to attack

directly plaintiffs' presentation, *see, e.g., Davis* v. *Califano*, 613 F.2d 957, 962 (D.C. Cir. 1979), and or to prove that the employment decision in question was based on a legitimate, nondiscriminatory consideration, *see, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1975).

11. Generally, there are two types of Title VII cases: those involving the "disparate treatment" of individuals and those involving "disparate impact" on classes of people. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977).

12. Claim of disparate impact

> involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity [citation omitted] Proof of discriminatory motive . . . is not required under a disparate impact theory.

Teamsters, supra 431 U.S. at 355 n. 15. The *prima facie* case under a disparate impact theory rests on evidence the facially neutral criteria select "applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975).

13. Racial discrimination maybe proven by the use of statistics which demonstrate a disparate impact on blacks. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Reynolds* v. *Sheet Metal Workers Local 102*, 498 F. Supp. 952, 966-67 (D. D.C. 1980) 702 F.2d 221 (D.C. Cir. 1981).

14. A disparate impact analysis measures the effects on protected groups of a practice or barrier which stands between potential and selected employees. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-31 (1971). Plaintiffs have employed disparate impact analyses extensively in these proceedings, submitting evidence which compares simi-

larly situated blacks and whites with respect to employment opportunities, such as access of experienced rodmen to the journeyman examination and thus to union membership and preferred referral status, access to the Apprenticeship Program, and hours worked. This evidence demonstrated that whites fare proportionately better than blacks in employment opportunities controlled by defendants. Plaintiffs also calculated the probability that the black/white disparities were due to chance. The calculations indicated that there were disparities that were statistically significant at the .05 level or at lower levels. *See Hameed* v. *Ironworkers, Local 396*, 637 F.2d 506, 514 (8th Cir. 1980); *Reynolds* v. *Sheet Metal Workers Local 102, supra*, 498 F. Supp. at 966.

15. Because plaintiffs have established a *prima facie* case of employment discrimination, defendants' burden is to rebut this showing by adequate proof that plaintiffs' statistical case is "accurate or insignificant," *Davis* v. *Califano*, 613 F.2d 957, 962 (D.C. Cir. 1979), or by showing that the demonstrated disparate impact resulted from the use of legitimate criteria which are justified by business necessity. *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

16. Defendants have offered no business justification for their conduct. Therefore, in order to rebut plaintiffs' *prima facie* case, defendants must demonstrate that the claimed inaccuracies or errors in the data are systematic rather than random, that they actually bias the results, and that the bias was sufficiently extensive that it would affect the validity of plaintiffs' demonstration of disparate impact. Defendants failed both to satisfy their burden of demonstrating that the claimed errors would affect the finding of discrimination, and to show that *any* of the supposed inaccuracies introduced any systematic error whatsoever. Defendants have thus failed in their attempt to undermine plaintiffs' *prima facie* showing of discrimination.

17. Claims of disparate treatment require a showing that individuals were treated less favorably than others because of their race, color, religion, sex or national origin. *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 335 n. 15; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 729 (1973). Plaintiffs must show discriminatory motive in addition to difference in treatment to establish a *prima facie* case. In cases involving allegations of class-wide differences in treatment, the disparities themselves—if great enough—can suffice to establish both the facts of disparate treatment and the racial animus. *See, e.g., Hazelwood School District* v. *United States*, 433 U.S. 299, 307-08 (1977); *Teamsters*, *supra*, 431 U.S. at 338.

18. Once plaintiffs have established a *prima facie* case of disparate treatment, defendants have the burden of showing that there was some permissible, business reason for the disparate treatment. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas Corp.* v. *Green*, *supra*.

19. Plaintiffs have established a *prima facie* case of disparate treatment, based upon their statistical showing of discrimination and individual instances of discrimination, including refusal to admit the named plaintiffs to the Apprenticeship and Training Programs or otherwise delaying their opportunity to become union members, discriminating against them in job referrals, lay offs and opportunities for overtime and acts of retaliation against them. Defendants have offered no business justification for these acts.

20. A violation of section 1981 generally is proven by the same evidence required to prove a violation of Title VII. Proof of a violation of section 1981, like proof of a violation of Title VII because of disparate treatment, requires proof of discriminatory motive, which can be demonstrated by use of statistical evidence.

21. The evidence presented demonstrates persistent, pervasive and intentional discrimination against black rodmen. This discrimination includes the following:

a. administering the membership policies of Local 201 such that the number of black members was significantly lower than the percentage of members who would be expected to be black in the absence of racial discrimination;

b. denial to blacks qualified to be journeyman members of Local 201 and the International of the opportunity to take the examination which would qualify them for journeyman membership and thus to preferred status for referral to work under the Collective Bargaining Agreement between the union and the CCC;

c. requiring qualified blacks to complete an Apprenticeship Program or a Training Program as a prerequisite to taking the examination;

d. using an unvalidated examination for journeyman membership;

e. imposing the requirement of a high school diploma or its equivalent for entrance to the Apprenticeship Program, thus eliminating a disproportionate number of blacks from the opportunity to enter that program;

f. delaying admission to union membership of blacks until they had worked significantly more hours in the rodman trade than whites who gained admission;

g. operating a Training Program for the purpose of delaying or denying blacks the opportunity to become union members;

h. operating the referral system in such a manner that blacks worked significantly fewer hours than whites;

i. giving preference to white union members with respect to overtime opportunities, layoffs and nature of work; and

j. engaging in acts of retaliation against blacks who attempted to exercise their civil rights.

These actions are all in violation of Title VII and Section 1981.

22. Defendants' discriminatory actions against plaintiffs and the class are continuing violations of Title VII and section 1981.

23. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits retaliatory conduct by employers and others in response to protected civil rights activities. Section 704(a) provides in relevant part:

> It shall be an unlawful employment practice for . . . [a] joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

24. To establish a *prima facie* case of retaliation, plaintiffs must show: (a) that they protested practices contrary to Title VII, thus engaging in "protected conduct" pursuant to Title VII; (b) that plaintiffs were subject to adverse action from the employer or labor organization either contemporaneous with, or after, their opposition or participation; and (c) that the adverse action is linked to the protected conduct.

25. Once plaintiffs establish their *prima facie* case, the burden of proof shifts defendants to demonstrate a legitimate, nondiscriminatory explanation for their conduct. If this can be shown, then plaintiffs must establish that defendants' non-discriminatory reason is in fact a pretext. *See McDonnell-Douglas Corp.* v. *Green, supra.*

26. Plaintiffs have claimed that the retaliatory actions occurred in response to their filing charges with the EEOC, their participation as plaintiffs in this suit, and the writing of letters of protest to the International. All of these actions constitute "protected conduct" pursuant to § 704(a).

27. Plaintiffs Jackson and Kirkland testified that they were involuntarily laid off, plaintiff Lewis testified that he was not admitted to the Training Program until he agreed to drop his charges, and plaintiffs Berger, Bellamy, and Lewis described veiled threats and harassment on the part of defendants. The actions of defendants complained of are classic examples of "retaliation" condemned under section 704(a). The failure of a union to refer members for work because of their protected activities, resulting in reduced earnings for those parties, is plainly prohibited.

28. There is overwhelming evidence that defendants and their agents knew of plaintiffs' participation in this suit or in otherwise protected conduct.

29. Defendants have attempted to rebut portions of plaintiffs' *prima facie* case by proffering other reasons for their conduct. While they do not dispute that various plaintiffs were laid off or not referred, they do dispute the reasons for the lay-offs. However, the showing of other sufficient justification for defendants' conduct does not defeat plaintiffs' claim of retaliation. Rather, the issue then becomes whether this proffered justification is being used as a "pretext" for a action taken for motives prohibited by Title VII. It is sufficient that plaintiffs

show that retaliation played *any* part in the conduct complained of.

30. Defendant International is liable for the discriminatory acts of Local 201 by virtue of its total control and domination of Local 201, and its active participation in and approval of the procedures used by Local 201. The evidence demonstrates that the International knew of the discriminatory conduct and its effect, and permitted the continuance of this conduct on the part of Local 201. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

32. Defendant CCC has discriminated against plaintiffs and their class by virture of its appointment of trustees to the Joint Apprenticeship Committee and the Training Program, and its negotiation and active participation in the parties' collective bargaining agreement. The evidence demonstrates that the CCC knew, or plainly should have known, that the activities in which it or its agents were engaged fostered continuous and pervasive discrimination against members of the plaintiff class.

33. Plaintiffs and the members of their class are suffering irreparable harm.

34. Plaintiffs are entitled to declaratory and injunctive relief against all defendants, as prayed for in their complaint, and are directed to submit a proposed order to institute such relief.

35. Plaintiffs are also entitled to back pay, in an amount to be determined at a hearing for damages.

36. As the "prevailing party" pursuant to Title VII plaintiffs are also entitled to their costs and attorneys' fees, in an amount to be determined at the hearing for damages.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

Date: Jun. 6, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1743

JESSIE BERGER, *et al.*,
Plaintiffs,

v.

IRON WORKERS REINFORCED RODMEN
LOCAL 201, *et al.*,
Defendants.

[Filed April 11, 1986]

AMENDED ORDER

WHEREAS, the Court has found after trial that Defendants Iron Workers Reinforced Rodmen Local 201 (Local 201); the International Association of Bridge Structural and Ornamental Iron Workers (International); the Apprenticeship Committee for Iron Workers Reinforced Rodman, Local 201 (Apprenticeship Committee); the National Iron Workers and Employees Training Program (Training Program); and the Construction Contractors Council (CCC) have engaged in persistent, pervasive and intentional discrimination against black rodmen in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, that Defendants' actions against Plaintiffs and the class constitute continuing violations of Title VII and 42 U.S.C. § 1981, that Plaintiffs and the class are suffering irreparable harm and that they are entitled to declaratory and injunctive relief,

it is HEREBY DECLARED that Defendants' actions violate Title VII and 49 U.S.C. § 1981, and

It is HEREBY ORDERED that Defendants are permanently enjoined as follows:

I. *Discriminatory Practices*

Defendants are enjoined from:

A. Administering the membership policies of Local 201 and the International such that the number of black members is significantly lower than the number of journeymen members who would be expected to be black in the absence of racial discrimination;

B. Denying blacks qualified to be journeyman members of Local 201 and the International the opportunity to take an examination which would qualify them for journeyman membership and thus preferred status for referral to work under the collective bargaining agreement between Local 201/International and the CCC and its members (Collective Bargaining Agreement);

C. Requiring qualified blacks to complete an Apprenticeship Program or a Training Program as a prerequisite to taking the examination referred to in Paragraph I B;

D. Imposing the requirement of a high school diploma or its equivalent for entrance to the Apprenticeship Program;

E. Delaying admission to membership in Local 201 and the International for blacks until they have worked significantly more hours in the rodman trade than whites have at the time they gained admission;

F. Operating a Training Program for the purpose of delaying or denying blacks the opportunity to become members of Local 201 and the International;

G. Operating the referral system in such a manner that blacks work significantly fewer hours than whites;

H. Giving preference to white union members with respect to wage scale, overtime opportunities, layoffs and nature of work including without limitation assignment to positions as superintendents, foremen and shop stewards; and

I. Engaging in acts of retaliation (such as threats, denial of referrals, assignment of lower-paying jobs, denial of overtime) against Plaintiffs and members of the class for exercising their civil rights by bringing this case.

II. *Admission To Membership*

Defendants Local 201 and the International shall:

A. Admit Plaintiffs Tucker, Simmons, Lewis and McMillian to journeyman membership in Local 201 and the International;

B. Admit each class member (as determined according to the procedures set forth in Paragraph III H below) (1) who has worked at least 3,000 hours as a rodman, on jobs referred by Local 201 as well as other jobs including without limitation non-union jobs, and has passed the examination administered by Defendants for journeyman membership, or (2) who, as of the date of this Amended Order, has worked at least 6,000 hours as a rodman, on jobs referred by Local 201 or another local union affiliated with the International, to journeyman status without requiring him to participate in the Apprenticeship or Training Program or to meet any requirements of the DEF or any similar program.

A class member who, as of the date of this Amended Order, has reached the 3,000-hour qualifying level described in subparagraph (1) above shall be permitted to take the examination administered by Defendants for journeyman status on the next date on which the examination is administered, but in any event no later than 30 days after the receipt by Defendant's counsel of the cer-

tification form described in Paragraph III H or the resolution of any timely challenge thereto, whichever is later. A class member who, as of the date of this Amended Order, has not yet reached the 3,000-hour qualifying level described in subparagraph (1) above, and who reaches such level at any time within 30 months of the date of this Amended Order by the addition (to hours worked as a rodman, on jobs referred by Local 201 as well as other jobs, including without limitation non-union jobs, as of the date of this Amended Order) of hours worked on jobs referred by Local 201 or another local union affiliated with the International, shall be permitted to take the examination administered by Defendants for journeyman status on the next date on which the examination is administered, but in any event no later than three months after the date on which the class member reaches the 3,000-hour qualifying level. A class member who is permitted to take the examination administered by Defendants for journeyman status pursuant to this Paragraph II B may take the examination every three months after the date on which he first takes the examination, up to a total of three times. No class member will be permitted to take the examination until the challenge procedures established by Paragraph III H below have been completed as to him.

Plaintiffs will be permitted to have a representative (either Tommy Kirkland, his alternate Randolph Jackson, or a subsequently designated representative) present to monitor any examination administered to any person, including without limitation any class member, and any discussions by the persons administering the examination or who have authority to determine whether a class member will be admitted to journeyman membership, regarding whether the class member passed the examination and should be admitted to journeyman membership. Plaintiffs' representative shall have access to all written materials regarding the examination of the class member and his candidacy for journeyman membership, includ-

ing, without limitation, test scores and evaluations by persons administering the examination. Plaintiffs' representative(s) shall agree to keep confidential information concerning the contents of the exam, except that such information may be disclosed to Plaintiffs' attorneys.

C. As long as the Defendants shall require a journeyman applicant to pass an examination, Defendants shall administer the test at least as often as the first business day of every quarter of every year;

D. Report to this Court by June 15, 1986 and on January 15 of each of the following three years, on the progress of the Defendants' efforts to satisfy the requirements of Paragraphs II A and B, including without limitation furnishing a list of all black rodmen admitted to membership in Local 201 and the International pursuant to Paragraph II B.

E. Place each named Plaintiff and class member who is or becomes a member of Local 201 and the International including without limitation all persons admitted to membership pursuant to Paragraph II B, in the highest referral category, Group A for referral to work pursuant to the Collective Bargaining Agreement.

III. *Referrals*

To ensure that named Plaintiffs and class members receive equal employment opportunities and that the referral system established pursuant to the Collective Bargaining Agreement does not continue to operate in an unlawfully discriminatory manner, Defendants shall institute within 14 days of the date of this Order and maintain in effect for a period of 4 years from the date of this Order the following procedures for operation of the referral system:

A. Local 201 shall obtain as a condition of further referral from each person seeking referral, including persons already referred and/or working for employers

covered by the Collective Bargaining Agreement, a form designating the person's race and including his signature;

B. A registration book shall at all times be maintained at the hiring hall of Local 201. Each person seeking referral through Local 201's hiring hall on a given day shall be required to sign his name on that day between 6:30 a.m. and 8:00 a.m. in the registration book as a condition of being referred for work on that day;

C. Referrals, including any referrals after 8:15 a.m., shall be made in order of sign-in, except as provided in this Paragraph III C, below, and in Paragraph III G. No person shall be referred for work who has not personally signed the registration book as provided in Paragraph III B except (1) when there is no registrant present at the hiring hall who is willing to accept the referral or (2) in connection with jobs requiring special skills (certified welder, welder certified by Maryland Department of Highways, tower crane erection and dismantling, and post-tensioning). In the exceptional circumstances described in this Paragraph III C (1) or (2), above, referrals will be made by calling persons on an alternating class member non-class member basis, based on lists of persons possessing the necessary skills (such lists to be developed and agreed to by Plaintiffs and Defendant Local 201 or their designated representatives). Defendant Local 201 shall publicize and make available information concerning how interested class members may seek training and certification in the aforementioned special skills and shall periodically provide classroom training, to the extent practicable, in welding, tower crane erection and dismantling, and post-tensioning.

D. The forms and a copy of the registration book shall be made available to Plaintiffs' counsel within three days of any written request made to counsel for Local 201;

E. Local 201 shall prepare and maintain a list of members of Local 201 and/or the International who are

referred for work each day by Local 201, such list to indicate the wage rate on the job to which each such member is referred, and such list shall be available to Plaintiffs' counsel within three days of any written request made to counsel for Local 201;

F. Within 10 days of the receipt of the quarterly report of the Pension Fund, Defendant Local 201 shall prepare and furnish to Plaintiffs' counsel a report, together with pension records, and other information used in preparing the report, showing:

(1) the total number of reported hours worked during the quarter by all persons referred for work and or working on jobs to which they were referred or which they obtained pursuant to the terms of the collective bargaining agreement, regardless of when the initial referral to a job was made;

(2) the total number of reported hours worked during the quarter by each named Plaintiff;

(3) the total number of reported hours worked during the quarter by blacks;

(4) the total number of reported hours worked during the quarter by whites;

(5) the total number of days on which persons seeking referral either were available for referral (as determined from Local 201's registration book) or actually worked (as determined from hours reported to the pension fund divided by eight) (hereinafter "man-days");

(6) the total number of man-days for each named Plaintiff;

(7) the total number of man-days for blacks and the total number of man-days for whites.

(8) a list of each person who was referred to a job as a shop steward, indicating the person's race, the date of the referral, and the job to which the person was referred as a shop steward; and

(9) a list of each person who was referred pursuant to the referral exceptions set forth in Paragraph III C(1) and (2), indicating the person's race, the nature of the exception, the date of the referral, and the job to which the person was referred.

G. For a period of one year, as provided in Paragraph III H, individuals who register in the registration book at the hiring hall on a given day shall be referred out on an alternating class member-nonclass member basis ("class member" for these purposes to include named Plaintiffs), the order of referral within each group to be determined by the order of sign-in that day; provided, however, that if there are any individuals in either group who have signed the registration book on a previous day and on the current day, have not yet received a referral, and who have not refused or been unavailable for more than four (4) referrals since their date of sign-in, such individuals shall have preference within their respective groups, based on their date and time of sign-in; provided further that this paragraph contemplates that referrals begin at 7:00 a.m. and that this paragraph is to be administered consistent with that schedule. For purposes of this paragraph only, an individual's status as a class member entitled to referral in the "class member" category shall continue for the one-year period described in Paragraph III H. On any given day, during the period that this paragraph remains in effect, the first individual referred for employment shall be a class member, provided that at least one class member has registered for referral on that day.

H. To be eligible for admission to journeyman membership pursuant to Paragraph II B and for priority in

referral pursuant to Paragraph III G, each named Plaintiff and class member must certify that he is a named Plaintiff and/or class member on the form discussed below and (to commence the referral priority) must have been admitted to journeyman membership in Local 201, either pursuant to Paragraph II B above or otherwise. From the date of his first referral after notice to Defendants of certification for a period of one year, the named Plaintiff and/or class member shall be entitled to referral in the "class member" category as described above.

Pursuant to Paragraph VIII below, a notice shall be distributed by Defendants to the named Plaintiffs and those persons who are believed to be class members, together with a form on which the recipient of the notice may certify that he is a named Plaintiff and/or class member. Plaintiffs and persons who believe themselves to be class members shall return the form to Plaintiffs' counsel, whowill [sic] thereafter advise Defendants' counsel of the name of the person who shall receive priority in referral pursuant to Paragraph III G, and shall provide copies of such forms to counsel for Local 201. Defendant Local 201 may challenge the entitlement of any certifying class member, except Plaintiffs, to admission to membership and/or referral priority by filing a challenge with the Court within 10 days of receipt of the certification and serving a copy on Plaintiffs' counsel. Within 10 days of the service, there shall be a hearing before the Court (or a magistrate or special master designated by the Court) to determine whether the challenge to the certification is valid. Any such challenge or lack thereof shall be without prejudice to any other position, claim or defense of any party or class member in this action.

IV. *Escrow Account*

A. All payments made into the escrow account established pursuant to the Stipulation in this action dated December 7, 1983 or otherwise paid by named Plaintiffs

or class members pursuant to any assessment for payment of Defendants' legal fees and expenses in connection with this action, shall be returned within 14 days of the date of this Order to the persons who made such payments and any obligation of the named Plaintiffs and class members to pay for Defendants' legal fees and costs in connection with this action shall be void;

B. Defendants are permanently enjoined from taking any action to suspend, punish, fine or otherwise adversely affect any named Plaintiff or member of the class on whose behalf this action was brought for failure to pay any dues, charges, fees (whether previously levied or levied in the future) assessed against members of Local 201 and/or the International in order to pay for Defendants' legal fees and other costs of defending this action.

V. *Backpay, Damages and Attorneys' Fee*

A status call will be convened to schedule proceedings for a determination of all backpay, other benefits to be provided in compensation, including without limitation pension, health insurance compensation and vacation benefits, and damages, including compensatory and punitive damages, and the award of costs and attorneys' fees.

VI. *Modification of the Collective Bargaining Agreement*

To the extent the Collective Bargaining Agreement and any other rules governing the activities enjoined or ordered herein are inconsistent with this Order, they shall forthwith be modified to bring them into compliance with this Order.

VII. *Notice of this Court's Order*

Defendant Local 201 shall post in a conspicious place in the hiring hall a notice advising union members and others of the Court's Order, including a copy of that Order.

VIII. *Notice to Class Members and Certification*

Within twenty days from the date hereof, Defendants shall send the annexed Notice to Class Members and Certification by first class mail, postage prepaid to (1) the rodmen identified as potential class members by counsel for Plaintiffs, and (2) those rodmen whom Defendants are able to identify as black workers who were referred by Local 201 between October 21, 1972 and October 21, 1975. A copy of the notice and certification shall also be posted in a conspicuous place in Local 201's hiring hall. The Defendants shall bear the expenses of sending the notice and certification to potential class members.

XIV. *Retention of Jurisdiction*

This Court shall retain jurisdiction over this matter for a period of five years to ensure that its Order is complied with.

/s/ John Garrett Penn
United States District Judge

Dated: Apr. 10, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1743

JESSIE BERGER, *et al.*,
Plaintiffs,

v.

IRON WORKERS REINFORCED RODMEN
LOCAL 201, *et al.*,
Defendants.

[Filed Apr. 11, 1986]

NOTICE TO CLASS MEMBERS

THE COURT IN THIS CASE HAS RULED THAT LOCAL 201 AND THE OTHER DEFENDANTS ENGAGED IN UNLAWFUL RACE DISCRIMINATION AGAINST BLACK RODMEN. AS A RESULT, CLASS MEMBERS ARE ENTITLED TO CERTAIN RELIEF. YOU MAY BE A CLASS MEMBER. IF YOU THINK YOU ARE A MEMBER OF THE CLASS CERTIFIED BY THE COURT, COMPLETE THE FORM ATTACHED TO THIS NOTICE AND RETURN IT AS DIRECTED BY THIS NOTICE.

On July 26, 1976, the Court certified the following class under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure:

1) all black persons who have applied for or sought, from representatives of Local 201 or the Inter-

national, membership in Local 201 and, in connection therewith, the International or who have applied for or sought, from representatives of Local 201, the Apprenticeship Program or the Training Program, admission to the Apprenticeship Program and/or the Training Program and who have been or might be excluded from Local 201 and, in connection therewith, the International or the Apprenticeship Program or the Training Program or any of the above by the alleged discriminatory practices of the Defendants and who could have filed timely charges with the EEOC when their class representatives filed such charges or who could have filed timely lawsuits when the class representatives filed the instant lawsuit.

2) all black persons who have been referred for employment by Local 201 or who have applied to Local 201 for referral for employment by any means, including filling out a referral slip, or presenting themselves at Local 201 and requestin representatives of Local 201 to refer them for work, and who have been or might be discouraged from applying for membership in Local 201 and in connection therewith, the International, and/or Apprenticeship Program and/or the Training Program by the allegedly racially discriminatory practices of the Defendants and who could have filed timely charges with the EEOC when their class representatives filed such charges or who could have filed timely lawsuits when their class representatives filed the instant lawsuit.

IT IS IMPORTANT THAT YOU PROMPTLY FILL OUT THE CERTIFICATE AND RETURN IT, FOR TWO REASONS:

FIRST, the Court's order granted certain affirmative relief to class members. That relief provides for admission to union membership and job referral priority for persons having certain qualifications. After you fill out and return this form, you may be entitled to some or all of these benefits.

SECOND, the Court ordered that proceedings should be held to decide the remaining issues in the case, including backpay, other benefits (such as pension, health insurance compensation and vacation benefits) and damages, and the award of costs and attorneys fees. These issues will be decided in separate proceedings before the Court, or a magistrate or special master designated by the Court.

It is therefore now necessary to identify individual class members. Accordingly, if you believe that you are a member of the class and you want to share in the benefits of any judgment favorable to the class, please complete the certification form that is attached to this notice and return it to:

John Oberdorfer, Esq.
Patton, Boggs & Blow
2550 M Street, N.W.
Washington, D.C. 20037

-or-

John F. Dienelt, Esq.
Reid, Smith, Shaw & McClay
1150 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20036

The certification must be notarized at the time you sign it.

You must return the certification no later than 30 days from the date defendants send this notice (date given below) in order to seek admission to journeyman status and/or referral priority under the order, or to

participate in the proceedings concerning backpay and other damages. There is, of course, no guarantee that a class member will be awarded any monetary damages or backpay.

IF YOU ARE INCLUDED WITHIN THE CLASS DEFINITION, YOU MAY NOT EXCLUDE YOURSELF FROM THIS CLASS ACTION. ANY JUDGMENT ENTERED IN THIS CASE WILL BE BINDING UPON YOU AND WILL PRECLUDE YOU FROM RAISING IN ANY OTHER FORUM CLAIMS COVERED BY THIS ACTION.

If you have any questions about this lawsuit, including any questions about whether you are a member of the plaintiff class, please call John Oberdorfer or Andrew Newman at 202-457-6000, or John Dienelt at 202-457-6147. PLEASE DO NOT CALL THE COURT WITH QUESTIONS.

DATED:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1743

JESSIE BERGER, *et al.*,
Plaintiffs,

v.

IRON WORKERS REINFORCED RODMEN
LOCAL 201, *et al.*,
Defendants.

[Filed Apr. 11, 1986]

CERTIFICATION

INSTRUCTIONS: If you believe that you are a member of the plaintiff class in the above lawsuit, please FILL IN the blanks and check the "Yes" and "No" blank, for as many of the statements that apply to you. Not all statements will apply to you, so please READ CAREFULLY.

Name:

Address:

Telephone No.:

Social Security #:

Date of Birth:

High School Diploma: Yes ——; No ——. Year ——

1. I am a black rodman. Yes ——; No ——.

2. I have been referred for employment by Local 201. Yes ——; No ——.

3. I have not been referred for employment, but I have applied to Local 201 for referral for employment. Yes ——; No ——. (Provide date if known: ————).

4. I applied or tried to apply for membership in Local 201. Yes ——; No ——. I did so on ———— (date if known) and was denied admission to Local 201 at that time by ———— (person if known).

5. I was denied admission to Local 201 because of race discrimination. Yes ——; No ——.

6. I applied or tried to apply for admission to the Apprenticeship Program and/or the Training Program. Yes ——; No ——. I did so on ———— (date, if known) and was denied admission by ———— (person if known).

7. I was denied admission to the Apprenticeship Program and/or Training Program because of race discrimination. Yes ——; No ——.

8. I was discouraged from applying for membership in Local 201 or for admission to the Apprenticeship Program and/or the Training Program because I believed the union discriminated against black workers. Yes ——; No ——.

9. In addition to hours worked as a rodman referred by Local 201, I have worked as a rodman in the following categories:

a) Jobs on referral by sister local unions affiliated with this International Union. Yes ——; No ——. If yes, state approximately how many total hours worked on such jobs: —— hours.

b) Non-union jobs. Yes ——; No ——. If yes, state approximately how many total hours worked on such jobs: —— hours.

10. I believe that between October 21, 1972 and October 22, 1975 I was a victim of racial discrimination practiced by the defendants. Yes ——; No ——.

_____
Signature

Sworn to before me this
—— day of ————, 1986.

_____
Notary Public

Return signed and notarized form by ———— to:

John Oberdorfer, Esq.
Patton, Boggs & Blow
2550 M Street, N.W.
-or-
John F. Dienelt, Esq.
Reid, Smith, Shaw & McClay
1150 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20036

If you have any questions, call Mr. Oberdorfer or Mr. Newman at 202-457-6000 or Mr. Dienelt at 202-457-6147.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6217

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN
LOCAL 201, *et al.*,

Appellants

Appeal from the United States District Court
for the District of Columbia

Before: Edwards, Starr and D.H. Ginsburg, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in part and reversed in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam.

For The Court

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: April 5, 1988

Per Curiam Opinion for the Court filed by Circuit Judges Edwards, Starr and D.H. Ginsburg.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN
LOCAL 201, *et al.*,

Appellants

INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON WORKERS, *et al.*
and consolidated cases 86-5027, 86-5028,
86-5275, 86-5276, 86-5277

[Filed July 29, 1988]

Before: Edwards, Starr and D.H. Ginsburg, Circuit Judges.

ORDER

Upon consideration of the Petition for Rehearing of Appellants Rodmen Local 201, Apprenticeship Committee and Training Program, the response thereto and of Appellants' Motion for Leave to File Reply, it is

ORDERED, by the Court, that the Clerk is directed to file Appellants' lodged reply and upon consideration of all of the foregoing, it is

FURTHER ORDERED, by the Court, for the reasons more fully set forth in the opinion of the Court filed this date, that appellants' aforesaid petition is granted.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Opinion *per curiam*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6217

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN, LOCAL 201, *et al.*,

Appellants

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL and ORNAMENTAL IRON WORKERS, *et al.*
and consolidated cases 86-5027, 86-5028, 86-5275, 86-5276, 86-5277

[Filed July 29, 1988]

Before: Edwards, Starr and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the Motion of Appellant International Association of Bridge, Structural and Ornamental Iron Workers, et al. for Leave to Late File a Petition for Rehearing and or Suggestion for Rehearing *En Banc*, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to file the lodged petition/suggestion, and upon consideration thereof, it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6217

JESSIE BERGER, *et al.*

v.

IRON WORKERS REINFORCED RODMEN, LOCAL 201, *et al.*,

Appellants

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL and ORNAMENTAL IRON WORKERS, *et al.*
and consolidated cases 86-5027, 86-5028, 86-5275, 86-5276, 86-5277

[Filed July 29, 1988]

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg, and Sentelle, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellants International Association of Bridge, Structural and Ornamental Iron Workers, et al. has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Nos. 88-699 and 88-820

SUPREME COURT, U.S.
FILED
DEC 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LEWIS, RONALD TUCKER, ERNEST BELLAMY, GARRETT SIMMONS AND WILLIE LEE MCMILLIAN,
Respondents.

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did statistical evidence presented on behalf of a class of experienced black rodmen, which identified, as the cause of a statistically significant disparity between the proportion of experienced black and white rodmen who became union members, the requirement that experienced blacks undertake classroom training before being permitted to take an exam for union membership, establish a *prima facie* case of racial discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981, as the courts below ruled?

2. Did the court of appeals correctly hold that defendant unions which at trial did not argue, or offer any evidence, that their membership practices are based on legitimate business reasons or are justified by business necessity, failed to rebut plaintiffs' *prima facie* case of racial discrimination?

3. Did the court of appeals correctly affirm the district court's ruling that the International Union was liable for racial discrimination when the facts showed that the International Union actively participated in and approved of the discriminatory membership practices implemented by its affiliate, Local 201?

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Nos. 88-699 and 88-820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LEWIS, RONALD TUCKER, ERNEST BELLAMY, GARRETT SIMMONS AND WILLIE LEE MCMILLIAN,
Respondents.

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Jessie Berger *et al.*, respectfully request that this Court deny the petitions for writs of certiorari filed by the International Association of Bridge, Structural and Ornamental Iron Workers ("the International") and its affiliated local union, Iron Workers Reinforced Rodmen, Local 201 ("Local 201").[1] The petitions seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit, reported at 843 F.2d 1395, *modified in part on reh'g,* 852 F.2d 619 (D.C. Cir. 1988), which held Local 201 and the International liable for racial discrimination against a class of black rodmen.

[1] By Order dated November 16, the Court granted respondents leave to file their opposition to the petition of the International, which was served on October 26, at the same time they file their opposition to Local 201's petition, served pursuant to an extension on November 17.

STATEMENT OF THE CASE

This case involves the efforts of a class of experienced black rodmen to gain membership in Local 201 and the International. Plaintiffs contended below that defendants' use of classroom training as a prerequisite to being permitted to take a test for union membership denied or delayed membership for qualified black workers. The district court found that defendants had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and 42 U.S.C. §1981 by this practice. After a "meticulous review" of the record (Pet. App. 4a), the court of appeals affirmed the district court's ruling in a detailed *per curiam* opinion (Edwards, D.H. Ginsburg and Starr, JJ.). Pet. App. 1a-87a.

At trial, plaintiffs presented a "straightforward" (Pet. App. 18a) statistical case in support of their claim of racial discrimination. As the district court found, the defendant unions required experienced black rodmen to complete one of two classroom programs (either the Apprenticeship Program for those 30 and under or the Training Program for others) as a prerequisite to taking the test for union membership, which no experienced worker failed. This prerequisite created unnecessary barriers to union membership that disproportionately disadvantaged experienced black rodmen, some of whom had worked more than 10,000 hours in the trade. *See* Pet. App. 17a-18a; Pet. App. 95a-96a, 97a-98a, 101a-102a (Trial Findings 12, 14, 17).

The court of appeals agreed that plaintiffs had demonstrated that the percentage of eligible blacks who became union members (*i.e.*, took and passed the journeyman exam) was lower than the percentage of eligible whites by a statistically significant margin, and thus that the challenged practice had a disparate impact in violation of Title VII. Indeed, the disparity resulting from the challenged practice was so great that the district court found, and the court of appeals affirmed, that defendants also had engaged in disparate treatment in violation of Title VII and had intentionally discriminated against the class in violation of section 1981. Pet. App. 18a-40a, 87a.

Defendants challenged the validity of a number of aspects of plaintiffs' statistical case. The court of appeals rejected those challenges. Pet. App. 27a-40a. The court of appeals, in particular, rejected defendants' claim that plaintiffs had failed to identify the specific practice that was discriminatory:

> Quite simply, defendants once again decline to recognize the thrust of plaintiffs' challenge. The "specific procedure" under challenge is the requirement of classroom training before experienced workers may qualify to enter the ranks of journeymen rodmen. That theory of the case fully satisfies defendants' obvious right to know precisely what is under challenge.

Pet. App. 34a. The court of appeals likewise ruled, contrary to defendants' assertion, that plaintiffs had established a causal connection between the challenged practice and the discriminatory result. Pet. App. 35a-36a.

Defendants made no response to plaintiffs' statistical case apart from the asserted inadequacies which the district court and the court of appeals rejected. The court of appeals observed that "[i]n the typical case, defendants' rebuttal case will likely focus on (1) inadequacies in the plaintiffs' statistical case, or (2) an alternative, more favorable statistical case, or (3) a nondiscriminatory explanation for the statistical disparities." Pet. App. 22a. Defendants, however, did not offer evidence of more favorable statistics. Nor did they offer evidence of a nondiscriminatory explanation for the racial disparities the district court found. *See* Pet. App. 150a-151a (Conclusions of Law 16, 18, 19). Thus, the court of appeals concluded that "[t]he record is, indeed, devoid of *any* affirmative rebuttal case" (Pet. App. 40a, emphasis in original) and affirmed the district court's findings of racial discrimination.

Applying traditional principles of agency law, the court of appeals upheld the district court's conclusion that the International was liable under Title VII because of its active participation in and approval of Local 201's membership procedures. Pet. App. 51a-63a. In addition, the court of appeals affirmed the ruling that the International was liable under section 1981. It held: "[t]his question need not detain us long . . . because . . . [t]he International's support of and participation in the very practices to which the plaintiffs' statistics apply is a sufficient basis from which the intent to discriminate on the part of the International may properly be inferred." Pet. App. 63a.

REASONS FOR DENYING THE PETITIONS

The court of appeals correctly applied established principles regarding proof of racial discrimination and common law agency in affirming the findings of the district court that defendants, "by adopting and implementing the requirement that applicants for union membership complete a Union-supervised educational program, discriminated against the properly certified classes of black plaintiffs in violation of Title VII and Section 1981." Pet. App. 87a. The decision below raises no issue worthy of review.

Local 201 tries in its petition to tie this case to the Court's decision in *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), and the issues presented in *Wards Cove Packing Co.* v. *Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-1387). However, nothing in *Watson* warrants further review of the instant case. Nor is there any connection between this case and *Wards Cove* that justifies Local 201's request that the Court defer action on, or grant, its petition. Similarly, the decision below does not conflict with the Court's decision in *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212 (1979), or national labor policy, as the International contends.

The court of appeals' ruling is nothing more than a routine, yet painstaking review of factual determinations of a trial court. Moreover, the decision of the court of appeals is correct. First, plaintiffs proved that a specific employment practice—the classroom training prerequisite—caused a disparity between experienced blacks and whites who sought union membership. Second, defendants failed to rebut plaintiffs' statistical case, either by offering their own statistical model showing an absence of disparate impact or by producing evidence of business justification or necessity. *Third*, plaintiffs proved, pursuant to established standards, that defendant International was aware of, and participated in, the discriminatory practices.

ARGUMENT

I. Neither *Watson* Nor *Wards Cove* Has Any Bearing On The Decision Below That Petitioners Violated Title VII And Section 1981.

Plaintiffs presented a straightforward disparate impact analysis under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Specifically, as the court of appeals observed, plaintiffs proved statistically that, during the three-year period prior to suit, the classroom training barrier interposed by Local 201 and the International between experienced black rodmen and the journeyman exam disproportionately kept those black rodmen from taking that exam and thus obtaining admission to the union.[2] The court of appeals likewise held that plaintiffs' "evidence relating to Union admissions going back to 1967 . . . showed a statistically significant disparity between the proportion of eligible blacks and whites who became union members." Pet. App. 26a.

Local 201 seeks this Court's review by attempting to link the instant case to *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988), and *Wards Cove Packing Co.* v. *Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988). But none of the issues in those cases has any effect on the unanimous opinion of the court of appeals in this case. No purpose would be served either by granting Local 201's petition or deferring decision on it pending resolution of *Wards Cove*.

A. Local 201 first presents the recycled argument that plaintiffs' showing of causation between defendants' practices and the discriminatory impact was deficient. Local Pet. 9-13.[3] However, the court of appeals ruled that plaintiffs' *prima facie* case had focused on a specific employment practice: "[t]he 'specific procedure' under challenge is the requirement of classroom training

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[2] The court of appeals affirmed that the disparity was statistically significant (Pet. App. 19a-20a, 26a & n. 16), a determination which petitioners do not dispute.

[3] The court of appeals twice rejected the centerpiece of Local 201's petition—that plaintiffs made an insufficient showing of causation. *See* Pet. App. 29a-30a, 34a-36a; Pet. App. 89a. Local 201 argues that the decision in *Watson* and the grant of the petition in *Wards Cove* occurred after the court of appeals' principal decision in this case. Local Pet. 9-10. However, both decisions were issued one month before the court of appeals ruled on Local 201's petition for rehearing.

before experienced workers may qualify to enter the ranks of journeymen rodmen." Pet. App. 34a. Moreover, the court of appeals expressly rejected the argument Local 201 is making here—that plaintiffs had failed to show "a causal connection between the challenged practice and the alleged discriminatory result." Pet. App. 35a. Plaintiffs proved their case, as *Watson* contemplates (108 S. Ct. at 2788), by "identifying a specific employment practice"—the classroom training prerequisite for experienced applicants—and by showing that this practice caused the disparate impact. Pet. App. 34a-36a.

B. No other aspect of *Watson* requires further consideration of the decision below. This case does not involve promotions based on subjective criteria, as did *Watson*, but rather union admission procedures using objective, standardized criteria: a classroom training requirement for all union membership applicants, regardless of experience, as a prerequisite to taking the journeyman exam.[4] The court of appeals' opinion is a proper application of *Griggs* and is well within the framework of *Watson*.

C. Nor does the "comparative statistics" issue on review in *Wards Cove* pertain to this case. There, the Ninth Circuit relied on statistics showing that a disproportionate number of minorities held low-paying, unskilled jobs and a disproportionate number of whites held high-paying, skilled jobs for its holding that 16 different subjective criteria had a disparate impact on defendant's workforce. 827 F.2d at 444. The petition granted by this Court challenged that ruling for its failure to provide statistics keyed to any one employment practice, and for its reliance on statistics providing nothing more than a snapshot of the composition of defendant's workforce.

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[4] A passage from the plurality opinion in *Watson* quoted by Local 201 makes clear that the evidentiary standards the opinion was describing were directed toward criteria which include subjective elements, not merely objective criteria:

> Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

108 S. Ct. at 2788-89 (citation omitted), cited at Local Pet. 11. Yet, as Local 201 concedes in its Questions Presented, the criterion at issue here is an "objective selection device." Local Pet. (i).

In contrast, the court of appeals here did not base its decision on statistics relating only to the racial composition of the union's membership. Nor did it fail to identify the particular employment *practice* that caused the disparate impact. The court of appeals identified the specific employment practice causing racial discrimination as the requirement that experienced black rodmen complete the Apprenticeship Program or the Training Program before taking the journeyman exam. The court of appeals also held that the discriminatory effect of this requirement was proven by comparing the racial composition of experienced rodmen seeking to take the journeyman exam to the racial composition of experienced rodmen admitted to the union.[5]

Local 201's petition erroneously argues that the Apprenticeship Program and the Training Program are somehow analogous to the routes to non-cannery and cannery employment in *Wards Cove*. Local Pet. 13. But the court of appeals here did not premise its ruling of discrimination upon a comparison of the percentage of blacks in the Training Program versus that in the Apprenticeship

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[5] Local 201 contends (Local Pet. 7), as it did below, that plaintiffs' statistical case improperly included apprentices in the "experienced pool." The court of appeals gave the argument appropriate short shrift:

> This argument suffers from a fatal flaw. Defendants' analysis focuses on black *participation* in the Apprenticeship and Training programs, rather than black *completion* of the programs (i.e., achievement of union membership).

Pet. App. 30a (emphasis in original). Local 201 claims, moreover, that apprentices should be subtracted *both* from the pool of applicants *and* the union membership. On this supposition, it argues that there would be no disparate impact. Local Pet. 11-14. Even assuming *arguendo* that not counting the examined apprentices has merit, correct application of Local 201's argument would require subtraction of these apprentices from the applicant pool *only*. This is because of "the unmanipulable nature of the figure of *actual* new members . . . ." Pet. App. 29a (emphasis in original). Removing apprentices, whom petitioners concede were predominantly white (Local Pet. 7), from the experienced pool would result in a bias in plaintiffs' favor and increase even more the deviation between the black composition of the applicant pool and the black composition of the group given an opportunity to take the exam. Plaintiffs' statistical approach, on this and other elements of the analysis challenged by defendants, was a proper and "conservative methodology." Pet. App. 25a; *see* Pet. App. 29a-30a.

Program, or on the racial composition of union membership generally. To reiterate, it based its ruling on a comparison of the percentage of blacks in the group of experienced rodmen who sought to become union members to the percentage of blacks in the group who became union members.[6]

D. In a final effort to gain review by this Court, Local 201 contends that the proper allocation of proof when a defendant has produced evidence that the challenged employment practices are based on legitimate business reasons is at issue here. It urges that this aspect of its petition be considered in light of *Wards Cove*.

No review is warranted on this basis because Local 201 presented no argument or evidence below on either a "business necessity" or a "job relatedness" defense.[7] Rather, defendants' entire defense was directed at contesting plaintiffs' statistical case. No defendant claimed that the challenged classroom prerequisite to the journeyman exam was based on legitimate business reasons.

> The record is, indeed, devoid of *any* affirmative rebuttal case—that is, seeking to prove by their own evidence that admission to union ranks was not racially disproportionate. We therefore

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[6] Local 201 seems to make a separate argument that the court of appeals' ruling that no named plaintiff had standing to challenge the high school diploma requirement for admission to the Apprenticeship Program means that statistics relating to examinees who completed the Apprenticeship Program are not relevant. *See* Local Pet. 7. This argument is wrong. The absence of a named plaintiff with standing to challenge the high school diploma requirement does not mean that statistics relating to defendants' use of the Apprenticeship Program as a prerequisite to the journeyman exam should be ignored in the analysis. As the court of appeals observed, plaintiffs' claim "is not that the Training Program or the Apprenticeship Program (setting aside the high school diploma requirement) were themselves discriminatory; rather it is that the requirement that the rodmen complete such a program before being allowed to take the journeyman examination worked discriminatory effects." Pet. App. 63a. Therefore, the courts below properly approved of the inclusion of those apprentices who actually took the journeyman exam in the "experienced pool" analysis.

[7] The plurality in *Watson* recognized that defendants have at least the production burden in connection with a business justification or necessity defense. 108 S. Ct. at 2790. Moreover, *Wards Cove* concerns the allocation of the burden of proof relating to a business necessity defense of *subjective* hiring criteria, in contrast to the *standardized* classroom training prerequisite challenged in this case.

> conclude, in light of our earlier analysis, that plaintiffs' prima facie case went unrebutted.

Pet. App. 40a (emphasis in original); *see* Pet. App. 150a-151a (Conclusions of Law 16, 18, 19). Thus, the court below "did not, in terms, formulate a 'business justification' test," as Local 201 appears to contend it should have. Local Pet. 15. The court had no need to do so, because no defendant offered any evidence on that subject. In fact, this Court is the first forum in which any defendant has attempted to raise the issue.

Contrary to Local 201's petition, the court below did not acknowledge "that the Local's practice of requiring classroom training for journeymen did, in *Watson's* words, further 'legitimate business reasons.'" Local Pet. 15. The court of appeals' general statements that unions may limit their size and are not required to admit unqualified individuals (Pet. App. 36a, 40a) cannot be distorted to suggest that the court approved the precise practice it held to be unlawful—the requirement of classroom training, regardless of experience, as a condition to taking the journeyman exam. Indeed, because defendant unions, during the so-called Open Period in part of 1971, permitted rodmen to take the journeyman exam solely on the basis of their experience in the trade, the court of appeals concluded "that the Union itself has not viewed an educational requirement as an absolute, minimum objective qualification." Pet. App. 39a. Thus, there was no conceivable business justification for defendants' discriminatory practice. As the court of appeals held, "the Union has, in effect, hoisted itself on its own petard, having chosen in the Open Period to treat experience alone as sufficient for admission to the journeyman exam. . . . In our view, *the Open Period establishes that experience can qualify one to be a journeyman rodman. . . .*" Pet. App. 39a (emphasis in original).[8]

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[8] As a third issue for this Court to review, Local 201 raises the court of appeals' assessment of plaintiffs' proof of disparate treatment. Local Pet. 9, n.7. However, Local 201 offers no reason for the Court to review this issue, and there is none. The court of appeals applied the well-established principle that statistical disparities themselves, when great enough, establish the discriminatory motive element of a disparate treatment case. *See, e.g., Hazelwood School District* v. *United States*, 433 U.S. 299, 307-08 (1977); *International Brotherhood of*

II. The Court of Appeals Correctly Affirmed The District Court's Ruling That The International Violated Title VII And Section 1981.

The court of appeals had "little difficulty concluding that the International's involvement in the membership practices of Local 201 was sufficiently extensive to subject it to liability under Title VII and section 1981." Pet. App. 51a. The court of appeals endorsed the district court's findings that "the International actively participated in and approved of Local 201's membership procedures." Pet. App. 63a. Accordingly, the court of appeals, applying established common law agency principles, affirmed the district court's determination that the International was liable.

A. On its review of the record, the court of appeals concluded that there was "overwhelming evidence of the International's awareness of and participation in Local 201's membership practices." Pet. App. 64a. The evidence amply supported the findings of the district court that: (1) the International at all times endorsed the existence of classroom training prerequisites for membership; (2) the International exercised significant control over the Apprenticeship Program and Training Program; (3) the International knew about Local 201's membership practices, the discriminatory effect of those practices, the racial imbalance in Local 201, and claims of discrimination against Local 201; (4) on at least two occasions, the International prescribed the membership test Local 201 employed; (5) the International created the Open Period and expressly instructed Local 201 to implement it; and (6) the International endorsed the system that "placed unnecessary barriers between *experienced* black rodmen and Union membership." Pet. App. 12a (emphasis in original); *see* Pet. App. 61a-64a; Pet. App. 138a-143a (Trial Findings 128-139).

Teamsters v. *United States*, 431 U.S. 324, 338 (1977); *McKenzie* v. *Sawyer*, 684 F.2d 62, 71 (D.C. Cir.1982). *General Building Contractors* v. *Pennsylvania*, 458 U.S. 375 (1982), cited by Local 201, merely reiterates the proposition that intent must be proven in a section 1981 case; it does not take issue with the principle, based on this Court's decisions, that statistical evidence may be used to prove intent.

The International ignores the "overwhelming" evidence (Pet. App. 64a) against it, making the bewildering assertions that "there was no evidence that the International knew that a disparate impact was occurring at Local 201" (Int'l Pet. 4) and that "[t]here was simply no evidence whatsoever in this case which showed that the International Union authorized, condoned or ratified the challenged conduct." Int'l Pet. 11. Similarly, the International claims that all of its activities "were designed to *increase* minority participation in . . . Local 201" (Int'l Pet. 14, emphasis in original), despite the finding that the International intentionally discriminated against experienced black permit workers. Pet. App. 63a-64a.

The International's assertions that the lower courts erred in finding the facts and reviewing those factual determinations would not warrant review by this Court, even if there were some support for those assertions in the record. *See Goodman* v. *Lukens Steel Co.*, 482 U.S. __, 96 L. Ed. 2d 572, 584 (1987). Here, there is no support for the International's factual claims.

B. The ruling against the International raises no issue of law warranting review. The court of appeals applied the test for international union liability established by *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212, 216-18 (1979)—the standard advocated by the International itself. Int'l Pet. 9. Contrary to the implication of the International's petition, the court applied the *Carbon Fuel* test *without* relying upon the International's constitution to support the imposition of liability. Int'l Pet. 11; *see* Pet. App. 59a-61a. Instead, the court focused on the International's conduct with respect to the membership practices at issue and found the International liable.

The International makes the absurd claim that the court of appeals' opinion conflicts with national labor policy and "could mean the end of the Labor Movement as we know it." Int'l Pet. 12, 13. The opinion, however, is just another in a long line of cases holding international unions liable under Title VII and section 1981 for discriminatory conduct at the local level.[9] It does not conflict

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[9] *See, e.g., Howard* v. *International Molders & Allied Workers Union*, 779 F.2d 1546, 1548 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 850-51 (5th Cir.), *modified on other grounds*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801 (1977); *Patterson* v. *American Tobacco*

with decisions of this Court or other courts of appeals. The International here did not merely attempt to mediate an isolated local dispute, as did the international union in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 738-39 (1969). Nor did the International take every reasonable step to bring Local 201 into compliance with the law, as did the international union in *Terrell* v. *U.S. Pipe & Foundry*, 644 F.2d 1112 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982). Rather, as the district court found, and the court of appeals affirmed, the International, over a period of several years, "actively participated in and approved of" the unlawful membership practices. Pet. App. 63a.[10]

Finally, upholding the International's liability in this case will not discourage other international unions from endeavoring to eliminate racial discrimination at the local union level. The court of appeals' decision will, if anything, deter international unions from creating, endorsing, or administering programs and policies that disproportionately discriminate against blacks seeking union membership. That result is entirely consistent with the purposes of Title VII and section 1981. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975) ("It is the reasonably certain prospect of a backpay award that 'provide[s] a spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,' " quoting *United States* v. *N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)).

Co., 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 737-38 (5th Cir. 1976); *Kaplan* v. *IATSE*, 525 F.2d 1354, 1359-60 (9th Cir. 1975); *Wheeler* v. *American Home Products Corp.*, 19 FEP Cas. (BNA) 143, 146 (N.D. Ga. 1979); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885, 911-12 (S.D. Tex. 1973). *Cf. Goodman* v. *Lukens Steel Co.*, 96 L. Ed.2d at 584-87 (International and two local unions held liable under Title VII and section 1981).

[10] *Sinyard* v. *Foote & Davies Division of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), also does not conflict with the rulings below. In *Sinyard*, the court refused to impose Title VII liability on an international union that had no involvement with the operations of its local. *Sinyard*, like the decision below, was decided on its facts. In the instant case, the facts established liability.

CONCLUSION

The court of appeals' decision applies sound principles of law established by this Court to the factual determinations of the district court. Neither Local 201 nor the International has presented any issue warranting review by this Court. The petitions for certiorari should accordingly be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A brief review of Respondents' opposition to the Petition for Writ of Certiorari re-enforces the conclusion that the Court of Appeals established a new standard for imposing vicarious liability on International Unions which is in conflict with this Court's decisions.

The Court of Appeals found that the conduct which was violative of Title VII and Section 1981 was the Local Union's converting of the Apprenticeship Program or the Training Program into an "educational prerequisite" to taking the journeyman exam. (Pet. App. 23a) The

Court also found, however, that the International Constitution neither required nor authorized Local Unions to require such an educational prerequisite. (Pet. App. 60a-61a)

The Court of Appeals imposed vicarious liability on the International Union based upon a "reasonable inference" of an agency relationship between the International and the Local Union (Pet. App. 61a) and an "inference" of International knowledge that a disparate impact was occurring. (Pet. App. 63a) It is respectfully submitted that the decision in this case sets up an entirely new standard for judging when an International Union will be held vicariously liable for the actions of an affiliated Local Union, which standard is contrary to this Court's decision in *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) and its progeny.

Prior to the decision in this case, the Court of Appeals were relying on the "substantial relation" test for determining whether an International Union would be held liable for a Title VII violation committed by one of its affiliated Local Unions. (*See*, e.g., *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds*, 556 F.2d 758, *cert. dism.*, 434 U.S. 801 (1977). In the instant case, the Court of Appeals correctly determined that the "substantial relation" test was inappropriate, having been developed prior to this Court's decision in *Carbon Fuel*, *supra*, and that the standards set out in *Carbon Fuel* represented the appropriate test for determining when an International Union will be held vicariously liable for the actions of an affiliate. After reaching this proper conclusion, the Court of Appeals then deviated from the *Carbon Fuel* test and, instead, relied on a test never before used in any case, namely, a "reasonable inference" test.

Under *Carbon Fuel*, there must be evidence that the International Union authorized, ratified, or participated

in the illegal conduct. (*Carbon Fuel Co.*, 444 U.S. at 217-18) This Court specifically discussed the Congressional intent supporting this standard:

> "In the face of Congress' clear statement of the limits of an International Union's legal responsibility for the acts of one its Local Unions, it would be anomalous to hold that an International is nonetheless liable for its failure to take certain steps in response to actions of the Local. Such a rule would pierce the shield that Congress took such care to construct." (*Id.* at 217-18)

Certainly the *Carbon Fuel* standard requires more than a mere "inference" of the predicates necessary to establishing the liability of an International Union.

The cases cited by Respondents demonstrate the novel nature of the decision in this case. Thus, at Page 11, Footnote 9 of Respondents' Brief, Respondents cite a string of cases for the proposition that this case "is just another in a long line of cases holding International Unions liable under Title VII and Section 1981 for discriminatory conduct at the local level." In addition to the fact that most of those cases are based on the "substantial relation" test, none of those cases support the novel theory in this case that a Court can "infer" the necessary predicates to establish vicarious liability for, in each, there was direct evidence of the International Union's participation in the illegal conduct. *See, e.g., Howard v. International Molders & Allied Workers' Union*, 779 F.2d 1546 (11th Cir.), *cert. den.*, 476 U.S. 1174 (1986); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds* 556 F.2d 758, *cert. dism.*, 434 U.S. 801 (1977) and *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. den.*, 429 U.S. 920 (1976) (International representatives in each case acted as advisors to Local Unions and played active roles in the negotiations leading to discriminatory practices); *Sagers v. Yellow Freight Systems, Inc.*, 529

F.2d 721 (5th Cir. 1976) (The collective bargaining agreement which perpetuated the discrimination was negotiated on a national level and the International President, International Vice-President, International Secretary-Treasurer and International General Organizer all served on the negotiating team); *Kaplan v. IATSE*, 525 F.2d 1354 (9th Cir. 1975) (International negotiated and was signatory to the bargaining agreement which incorporated the discriminatory roster provisions); *Wheeler v. American Home Products Corp*, 19 FEP Cas. (BNA) 143 (N.D. GA. 1979) (Plaintiff requested assistance to end the discriminatory treatment, which assistance was denied Plaintiff by both the Local Union and the International); *Taylor v. Armco Steel Corp.*, 373 F.Supp. 885 (S.D.TEX. 1973) (International Union entered into a "Master Agreement" with the employer in addition to signing the "Local Working Agreements" between the employer and the Local Union pursuant to which the discriminatory practices were conducted); *Goodman v. Lukens Steel Co.*, 482 U.S. ——, 96 L.Ed.2d 572 (1987) (The International Union was the "certified bargaining agent" of the employees and the Local Union acted "on its behalf." (*Id.*, 96 L.Ed.2d at 581 n. 4))

To Petitioner's knowledge, the instant case is the only case holding that vicarious liability can be imposed upon an International Union on the basis of "inferring" an agency relationship and "inferring" knowledge of a disparate impact. Presumably, if Respondents' counsel were aware of another such case, they certainly would have cited it. This "reasonable inference" standard is made even more egregious since the Court used this inference to find the International guilty of discrimination against Plaintiffs in violation of Section 1981 which constitutes intentional discrimination. (Pet. App. 63a)

Respondents argue that this case raises no issue of law warranting review. Petitioner submits that this case raises a serious issue which requires review by this Court,

namely, whether the *Carbon Fuel* standard of liability must be followed in Title VII actions or whether a Court may impose vicarious liability upon an International Union under this novel and undefined "reasonable inference" standard. This is a critical question which will have a far ranging impact on whether International Unions will continue or cease their attempts to increase minority participation in the ranks of their affiliated Local Unions.

With respect to the policy considerations presented by the underlying decision, the Respondents blithely state that this decision will not discourage other International Unions from endeavoring to eliminate racial discrimination at the Local Union level by creating, endorsing or administering affirmative action programs. (Respondents' Brief Page 12) Petitioner would submit that that argument ignores the significance of the underlying decision. Here, the Court of Appeals specifically noted the beneficial aspects of the Training Program which the International participated in creating *at the request of the Federal Government*:

> "With the Training Program, the International 'acted to create a vehicle that would bring into [the Iron Workers Trade] a high percentage of minorities who when they finished this Training Program would be qualified to earn a living at the Iron Workers' negotiated wage scale.' TR. at 3298. As applied to *inexperienced* blacks, the program did indeed open new avenues of opportunity that previously may have been closed; in that respect, the Training Program is to be commended." (Pet. App. 62a [emphasis the Court's])

Notwithstanding that praise, the Court went on to find that the Training Program was discriminatory in one aspect:

> "But in aiming the Training Program broadly at all non-members who were not qualified to enter the

> Apprenticeship Program, the International endorsed a system that placed unnecessary barriers between *experienced* black Rodmen and union membership." (*Id.* [emphasis the Court's])

Despite Respondent's arguments to the contrary, there was absolutely no evidence that the International Union ever "endorsed" the educational requirement or even knew of the educational requirement. In relieving the Training Program and the Apprenticeship Committee themselves from liability, the Court of Appeals noted in its decision on Petition for Rehearing:

> "The *only* practice (along with acts of retaliation) that we held to violate Title VII or Section 1981 was the Local's requirement that experienced Rodmen complete an educational program run by one of the two committees. The Plaintiffs have pointed to no record evidence demonstrating that either the Training Program or the Apprenticeship Committee had any role (or any authority) relevant to that practice. Most significantly, the Plaintiffs have not pointed to any findings by the District Court that even arguably form an adequate predicate for holding these distinct entities liable jointly with Local 201 for the *unilateral acts of that Local*." (Pet. App. 91a [partial emphasis the Court's, partial emphasis added])

Likewise, there was no evidence that the International Union had any role relative to that practice and, indeed, the Court found that the International's Constitution did not authorize such a practice. Thus, like the Employer Council, and the Training Program and the Apprenticeship Committee, the International, which is a distinctly separate legal entity, should have been relieved from liability for this practice.

If this newly-created ability to "infer" knowledge and responsibility to an International Union is permitted to stand, other International Unions will certainly shy away from undertaking any involvement in affirmative action programs in the future for fear of being held

vicariously liable for Local administration of those programs, as to which administration the International may have no involvement and no knowledge. This cannot be the result which Congress envisioned when it enacted Title VII and Section 1981.

CONCLUSION

It is respectfully submitted that this Court should grant the Petition for Writ of Certiorari and take this opportunity to specifically set forth the standard by which an International Union must be judged in the Title VII context before vicarious liability may be imposed upon it for the actions of an affiliated Local Union. If courts are permitted to impose vicarious liability upon International Unions based on nothing more than "inferences," this decision will denude the standards set forth by this Court in *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) and will destroy the "shield that Congress took such care to construct" (*Id.* at 218) in limiting International Unions' legal responsibility for the acts of their affiliated Local Unions.

Respectfully submitted,

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